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American Bar Association JOURNAL

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February, 1960

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The President's Page

John D. Randall

(Continued from page 3)

office in Cedar Rapids when a woman came rushing in to see me, clutching a newspaper in her hand.

"Oh, Mr. Randall," she said, "my husband has not been home for two nights. You must go down to the jail and get him out."

"How do you know he is in jail?" I asked.

"Well," she replied, "I am certain of it from this story in today's paper. It says right here that there is an unidentified man who has been in jail for two nights whose mind is a perfect blank." She smiled at me. "That, Mr. Randall, is a perfect description of my husband Henry."

You can see that this joke was too big to be limited to only one page.

As I write this page, many of the newspapers and magazines are reviewing the political, economic and international events of the past year and forecasts are being prepared not only for this year but for the new decade. It would be worthwhile for us to pause a moment and conduct the same type of inventory of events relating to our profession.

There have been a good many beneficial changes in the legal profession since the turn of the century. One of the most significant has been the increased concern in the profession for the training of the lawyer for his role as the custodian of the legal conscience of the community.

The law schools have responded to this need. I was in St. Louis the latter part of December to attend the annual meeting of the Association of American Law Schools and to speak at the Round Table on Continuing Legal Education. There was widespread interest in a program of education after law school and throughout the career of the lawyer. The interest of the organized Bar in such a program is well illustrated by its effort in the creation and construction of bar centers. I was much impressed while in Oklahoma at the interest and dedication demonstrated by the members of the Oklahoma Bar in their work on behalf of the proposed Oklahoma Bar Center. Continuing legal education is truly the responsibility of the individual lawyer, the local bar association, the local law school and the American Bar Association.

As we enter the 1960's we must also note the growing desire that the law schools re-examine their curricula, with a view toward the elimination of those overly technical and narrow "how-to-do-it" courses, which could be handled well in an effective program of continued legal education. Often these narrower courses are relatively easy, once the student has grasped fully the nature of law, its logic and its purpose. I feel that without some basic instruction in jurisprudence and the philosophy of law, we are apt to feel cast adrift among casebooks, texts and developed specialties in one subject or another.

The concern I have for the fundamental feeling for the law is directly related to a charge which we have come to hear more often during the past few years. It is the charge that the law is no longer a profession, that it is just another business, practiced by form book, with lower ideals and lessened public respect.

While I am convinced that the charge is not true in general, I am concerned about the reasons which in individual cases might give rise to this criticism. They exist only when an individual lawyer for a moment loses the vision of his profession and his own role as a servant of the law.

But such is not the case today. Lawyers have always given personal legal advice to their fellow men—regardless of whether they receive compensation—and I am certain that they will continue to do so. Lawyers will continue to be entrusted with the secrets of other men and with their money and with the power to act for them and in their husbandry they will be known as honest. Lawyers will continue to know human nature and their knowledge of the law will enable them to work out solutions to the problems of their fellow men.

I think the only danger lies in a somewhat mistaken impression that these problems are no longer those of persons when lodged, for example, in a city hall, in the head office of a multi-state corporation, in the Capitol or on the floor of the United Nations itself.

As lawyers, you and I know that problems don't really exist in any of these places. People sometimes get unnerved and tend to magnify their problems through identification with some group or large enterprise. Alternatively they think of themselves as unique in having a problem and defend fiercely their right, title and interest in the problem and defy attempts to carry the load and assist in the solution.

No, as long as we listen to our clients and their problems and as long as we strive to help them, I have no fears about our losing our identity as a profession.

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.

Judge Miner's Proposal "Really an Excellent Idea"

I have just finished reading Judge Julius H. Miner's article in the December, 1959, issue of the AMERICAN BAR ASSOCIATION JOURNAL. I am sure that you will have a considerable reaction to Judge Miner's principal idea to dispel court congestion. I simply want to voice my own strong agreement with his idea and hope that it will be adopted generally throughout the various districts of the federal court system.

It is really an excellent idea.

PETER H. BEER

New Orleans, Louisiana

Government Bureaus Occupy Highest Ivory Tower?

Anent the "ivory tower" letter of Mr. Herbert A. Doyle, Jr. (November, 1959).

Agreed that *thousands* of Government personnel are performing "an outstanding, and somewhat thankless, job for the American people". Often "thankless" because many of the jobs are: unnecessary and unwarranted; "services" not "demanded" by the general public, as some would have us believe; and serve policies in which we have little voice.

Many consider some of the Government bureaus to be the ultimate in "sheltered ivory towers".

C. M. KUCERA

Houston, Texas

Law and Medicine, A Case for Co-existence

In your October, 1959, issue of the JOURNAL, you published a very frank and convincing article by Dr. Louis M. Orr on the medico-legal relationship, both in and out of courts. I should like to say that the doctor who wrote the essay has made a proper, correct and cogent appraisal of the mutual relationship between the two learned professions and a dispassionate observer would be led to say that much may be said on both sides.

It is however fanciful to suggest that the so-called trial lawyer, adept in the art of cross examination would ever seek the opportunity to mortify the medical witness in the box. The lawyer, be it said, is after all doing his duty of saving his client from the prison or gallows. And he is a limb of the judiciary. It is no part of his duty to ridicule the doctor in the witness box who is said to be defenseless. I would like to ask, "defenseless" against whom? Court or counsel? I think neither of the two. The doctor's fear is more imaginary than real, for a doctor who is an expert in his study of the patient and thorough in his diagnosis and as to the correctness of the certificate given by him, there is indeed very little that he need be afraid of. On the contrary it will be the counsel who will have to be on guard in cross examining a doctor who knows his job.

It is puerile to indulge in mutual denunciation, the doctor calling the lawyer shyster and the lawyer calling the doctor quack. Both should remember that they are members of learned professions and it would be an affront to their respective professions to indulge in mutual mudslinging.

At the same time, I would like the doctor to remember that the duty of giving evidence in the court is as sacred as looking after his patient and that there is an indissoluble link between the doctor and the lawyer.

I agree however with Dr. Orr, that the medical witnesses have to wait a great deal in courts which of course entails a considerable sacrifice of their professional time. I feel the best solution would be to give first preference to doctors in courts and send them away.

Doctors also should not assume an air of superiority in courts and it will be well that they remember they are just witnesses. If the misapprehension on the part of doctors about the lawyers is due to misguided thinking, the legal profession would certainly cure it, and if the wrong is on the side of the lawyers themselves, there are courts to correct it, and bring about the adjustment.

P. NAGARAJA RAO

Nandyal, South India

Courtesy in the Courtroom

President Randall's suggestion, set forth in "The President's Page" of the December, 1959, issue of the JOURNAL and mentioned in the December 15 issue of *American Bar News* under the heading "Inside ABA", concerning the creation of a commission of "elder statesmen" of the Bar of each state to hear privately complaints from lawyers about discourteous or unfair treatment at the hands of sitting judges interested me.

I have been a trial judge in the Court of Common Pleas of Lake County, Ohio, since January 1, 1929, except for some four years when called back to serve in the Army. During these years of service in a very busy court, many lawyers have appeared before me and have, with rare exceptions, been courteous and given me fair treatment and I have tried to reciprocate. It is needless to say that I am proud of our profession and the lawyers who practice it, as were my grandfather, father and uncle before me.

However, like any other profession, or business, or calling, be it clerical, legal, medical or industrial, there is

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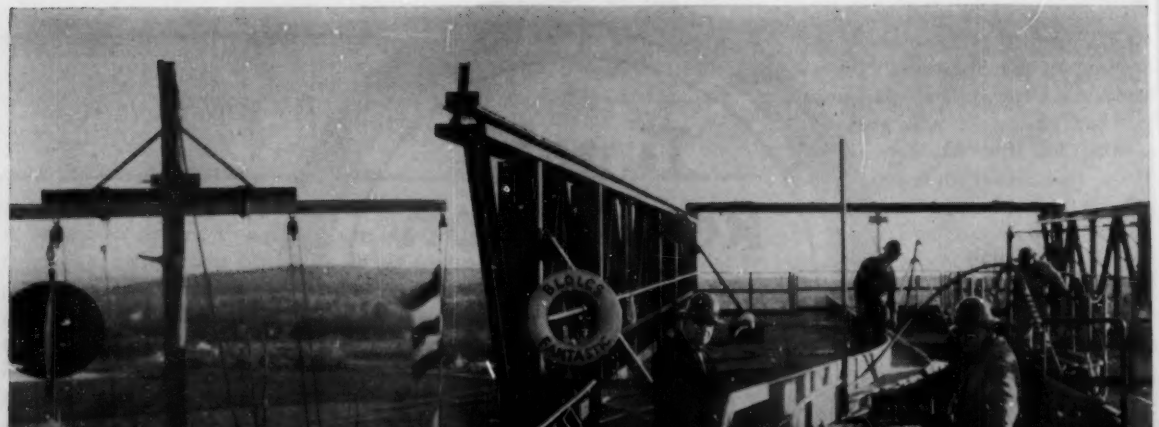

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There are eighteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Family Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral and Natural Resources Law; Municipal Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference or the Section of Legal Education and Admissions to the Bar. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $5.00; Criminal Law, $2.00; Family Law, $5.00; Insurance, Negligence and Compensation Law, $5.00; International and Comparative Law, $5.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral and Natural Resources Law, $7.00; Municipal Law, $5.00; Patent, Trademark and Copyright Law, $5.00; Public Utility Law, $5.00; Real Property, Probate and Trust Law, $5.00; Taxation, $8.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois. An application for membership should be accompanied by a check for dues in the appropriate amount as follows: $16.00 for lawyers first admitted to the Bar in 1954 or before; $8.00 for lawyers admitted in 1955, 1956 and 1957; and $4.00 for lawyers admitted in 1958 or later.

Manuscripts for the Journal

■ The JOURNAL is glad to receive from its readers any manuscript, material or suggestions of items for publication. With our limited space, we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors. Articles in excess of 3000 words, including footnotes, cannot ordinarily be published.

Manuscripts submitted must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet these requirements.

Manuscripts are submitted at the sender's risk and the Board assumes no responsibility for the return of material. Material accepted for publication becomes the property of the American Bar Association. No compensation is made for articles published and no article will be considered which has been accepted or published by any other publication.

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(Continued from page 118)

always a very small minority who prove the exception to the general rule. In dealing with them it is extremely hard for a judge, or any human being, despite his best efforts, to be courteous. Perhaps they do not deserve it.

Therefore, I hope President Randall's recommendation is adopted, provided the judge's side of the story is heard by these "elder statesmen". I saw no mention of a hearing for the judge in this otherwise excellent suggestion.

W. S. SLOCUM

Painesville, Ohio

He Likes a Time Limit for Oral Arguments

As a lawyer who has been engaged in appellate arguments before our courts for more than half a century, I venture to disagree with Mr. Robert Ruppin's *American Versus English (Appellate) Arguments* in your December issue.

1. I prefer a time limitation for argument. It preserves equality between opposing counsel. The lawyer can overcome the supposed hardship of the time limit by the care with which he prepares his argument to fit the limit. Even the drastic limit of our own state supreme court of half an hour to a side need not cripple the lawyer's argument if he has written the most thoughtful brief of which he is capable; for in half an hour the lawyer can bring out of the clutter of the record the strongest two or three points on which he relies and set them in clear relief.

2. I believe we should relish questions from the court. We need to know what the judges are thinking. If we know all the aspects of the case we should be able to profit by their questions.

Because half an hour to a side is so short for argument, our state supreme court is sparing of questions. This is a pity, and for this reason I would prefer three quarters of an hour to a side, as in our U. S. Circuit Courts of Appeal, so that there can be greater interchange of ideas between lawyers and juries.

I enjoy most of all arguments in the United States Supreme Court where the still longer time limit enables its justices to interrupt the more freely with questions and where the lawyer has a sense of unhurriedness that is welcome. But this is enjoyment, not a necessity. In short, time limits that are reasonable discipline the lawyer, make him work harder. Such discipline is good for us all.

3. True, much depends on the character of the appellate court. If the lawyer is fortunate enough to appear before a hard-working, conscientious appellate bench, such as we have in the State of Washington, that keeps up with its heavy work schedule, whose opinions disclose that they have faithfully studied briefs and records—and a majority of our jurists, I believe, measure up to this standard—the time limitations work well. If jurists fall below that standard unlimited argument will still be inadequate.

BENJAMIN H. KIZER

Spokane, Washington

(Continued on page 126)

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The Problems of an International Patent

The paper by Mr. Richard Spencer entitled *A European Patent: An Old and Vexing Problem*, pages 1157-1159 of the November, 1959, JOURNAL, is an interesting and valuable historical review of conventions dedicated to develop an international patent practice. He notes that convention members, of necessity, have been required to establish limited reciprocal privileges but that no standard has developed to make all patent rights reciprocal. In my opinion, we are presently unable to agree upon a uniform world practice for at least the following reasons:

(1) The patent is a grant of a monopoly and the rights which therein accrue depend upon the antitrust attitudes of the respective sovereigns which, being non-uniform, also fluctuate with time and economic necessity.

(2) The patent grant is a property right which, by definition under the common law, is what the sovereign is willing to grant. Property rights, in particular, vary under civil and common law systems and even *renvoi* fails to establish a coherent practice of international law. A property right has meaning only when backed by the potential force the sovereign can and may possibly apply to carry out its determination; it is a serious question, at present without answer, whether convention members can intelligently enforce the property right in a patent granted in a foreign country, even after review by a designated international group.

(3) There are lacking standards of invention, patent review and opposition (for example, no opposition to patents but opposition to trademarks in the U. S. Patent Office), methods of proving conception and reduction to practice, loss of patent rights due to sale, use or publication prior to patent application, taxation to force practice of invention, and, more specifically, social and political attitude in relation to both the inventor and society towards promotion of the arts and sciences.

(4) Organizations which seek patent monopoly in other countries have local legal representatives familiar with the oddities of the legal system and are uniquely set up to remedy local infringement.

It may be stated that absent iron curtains, intense nationalism, and social, political and economic insulation, national patent practices and industrial development will ultimately lead to a more uniform international patent system, but this will only be accomplished deliberately by the slow and meticulous elimination of differences in the legal systems of the world.

BENJAMIN BERNSTEIN

Garden City, New York

We Like To Hear This

I would appreciate your renewing my student subscription to the AMERICAN BAR ASSOCIATION JOURNAL, as per the enclosed application. I would further appreciate having this renewal start with the January, 1960, volume, as I do not want to miss any issue of the JOURNAL.

As a married, evening law student,

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my time must be rationed rather carefully; but I've found that the time spent reading the A. B. A. JOURNAL, whether in research for a law review article, entertainment, or for the more intangible but nonetheless real feeling of being brought closer to my chosen profession, is time well spent.

Therefore, along with this renewal, I want to send my thanks for the issues of the past year, and for the education, enjoyment and spirit which they have given me.

STANLEY W. NATHANSON
Brooklyn, New York

In Defense of Senator Joe

The review of Richard Rovere's biography *Senator Joe McCarthy* in last December's JOURNAL displays a considerable ignorance of the workings of the Communist conspiracy.

The reviewer is apparently unaware that the author of this lengthy attack on Senator McCarthy was for years on the payroll of the Communist Party as an editor of the Communist publication, *New Masses*. It was the Communist Party which coined the smear term "McCarthyism" (*Daily Worker*, May 4, 1950) and gave it widespread currency.

The reviewer refers to "the suspicion" of Alger Hiss's guilt. Since Hiss's conviction for perjury in denying that he turned secret State Department documents over to Communist agents was approved four times by the federal courts and certiorari twice denied by the Supreme Court, the word "suspicion" ranks as the legal understatement of the year.

The reviewer charges Senator McCarthy with leading a witch hunt "with his tales of spies and hidden agents". It was McCarthy who first exposed the hidden agent William Remington, who occupied a key position in the Department of Commerce where he was able to hold up export licenses for the delivery of supplies to the Republic of China while it was struggling to prevent the Communists from seizing mainland China (conviction affirmed 208 F. 2d 567). It was McCarthy who first exposed Edward Rothschild, who was handling the assembly of secret military and Atomic Energy Commission documents in the Government Printing Office, after these documents had been printed piecemeal in separate areas to prevent any one person from knowing their total contents.

It was McCarthy who first exposed the espionage ring in the electronic warfare laboratories at Fort Monmouth. Two years later a high-ranking Russian electronics warfare officer defected to the West. Testifying under the pseudonym of Colonel Andriyve to protect his family, he told the Senate Internal Security Subcommittee in June, 1956, that he personally examined in Moscow a great quantity of secret and top secret American radar documents which had been stolen from Fort Monmouth.

It was McCarthy who first exposed the hidden agent Owen Lattimore. Later, after hearing fifteen volumes of sworn testimony, the Senate Internal Security Subcommittee, which was composed of seven lawyers and did not

include McCarthy, unanimously concluded that Lattimore was "a conscious, articulate instrument of the Soviet conspiracy".

It was McCarthy who uncovered a Communist named Annie Lee Moss working in the code room of the Pentagon. The Anti-Anti-Communist League went into action, and like Rovere and his book reviewer, accused McCarthy of witch-hunting. On October 30, 1958, press dispatches announced the release by the Subversive Activities Control Board of records filed with it by the Communist Party which listed this same Annie Lee Moss as a card-carrying dues-paying party member.

The reviewer just cannot believe that there are any real Soviet spies or hidden agents. The unpleasant facts are that Anglo-American atomic and hydrogen bomb secrets were stolen, not by imaginary witches, but by scientists Klaus Fuchs and Bruno Pontecorvo, both now working behind the Iron Curtain. Anglo-American State Department secrets were stolen, not by creatures of McCarthy's imagination, but by Henry Julian Wadleigh (who confessed to taking 500 documents), Alger Hiss, Guy Burgess and Donald Maclean. So effective are the Soviet hidden agents, ridiculed by the reviewer, that they were able to whisk Burgess, Maclean, Mrs. Maclean and three small Maclean children from under the surveillance of Scotland Yard to Moscow after British McCarthyites had demanded an investigation.

So infected are reviewer and author with the virus of anti-McCarthyism that they are unwilling to credit the Senator with the remarkable warning he uttered on October 30, 1955, long before the Soviet luniks and sputniks:

> Today the decisive weapon is the hydrogen bomb: yesterday, it was the atom bomb. Tomorrow—and by tomorrow I mean possibly within the next year—the decisive weapon . . . could well determine the fate of Western civilization. Yet tonight I must report to you that the available evidence is (1) that the Soviet Union is winning that race, and (2) that it is possible that the Soviet Union is winning the race because well-concealed Communists in the United States Government are putting the brakes on our own guided missile program.

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The intercontinental ballistic missile will revolutionize warfare in our day—as, in the past, warfare was revolutionized by the invention of gunpowder, later by the airplane, and, more recently, by the atom and hydrogen bombs. And, as always—when one side has the revolutionary weapon and the other does not—the latter is at the absolute mercy of its enemies.

Now, my good friends, the best and only known defense against a Communist-guided missile attack is an intercontinental guided missile arsenal of our own.

Since Senator McCarthy was also a lawyer and a judge I am sure the JOURNAL will want to do justice to his memory and to print both sides of the McCarthy story.

J. F. SCHLAFLY, JR.

Alton, Illinois

Russian Bear and Red Fleas

Mr. Robert Coulson, of New York City, reviewed the book entitled *Senator Joe McCarthy* by Richard H. Rovere (JOURNAL—December, 1959, page 1298).

A part of one paragraph in that review creates a presumption of propaganda serving to nullify an objective book review. The suspect sentence is "McCarthy's roots were planted in a pumpkin field and fertilized by the *suspicion* of Alger Hiss's treason".

Unless memory fails the writer completely, Alger Hiss was not only suspected but was convicted. The microfilm in the Chamberlin pumpkin supplied the affirmative evidence for the conviction.

Mr. Coulson might also read *Masters of Deceit* by J. Edgar Hoover, Director of the Federal Bureau of Investigation.

If there is a moral or rule to be derived from the subtle efforts of so-called liberals, minimizing the constant "Cold War" of the Communists it can be said to be, "He who crawls in bed with the Russian Bear will acquire some Red fleas."

STANLEY M. DOYLE

Polson, Montana

Which Witch Is Which?

Apparently the "bile choking [his] gorge" seeped into his pen when Robert Coulson wrote his alleged "review" of Rovere's *Senator Joe McCarthy.*

A more astounding collection of clichés, fallacies and diatribe would be difficult to find in the pages of a lay journal, not to mention a journal for members of the Bar.

It is obvious, from his flippant use of language such as "red fleas", "suspicion of Alger Hiss's treason", "witch-hunt", etc., etc., that Mr. Coulson is woefully ignorant of or indifferent to the danger against which Senator McCarthy fought. For background, I suggest he read the scholarly and unhysterical analysis of "McCarthyism" in Buckley and Bozell's brilliant *McCarthy and His Enemies.* And if he wishes to be really intrigued with "tales of spies and hidden agents" let him read the fantastic case involving the almost successful attempts by Paul H. Hughes to convince willing listeners Joseph L. Rauh, Alfred Friendly and other assorted anti-McCarthyites of preposterous tales such, for example, as the whopper that Senator McCarthy and his staff had amassed an arsenal of pistols, machine guns, etc., in the Senate Office Building.

Witch hunt, Mc. Coulson? Depends on whose witch is hunted!

GERTRUDE J. BUCK

Bayside, New York

McCarthy Review Was Three Columns Too Long

The review of Rovere's book was three columns too long. "Will we ever be safe" from people who have never read J. Edgar Hoover's book *Masters of Deceit.* One of Reviewer Coulson's gems is "McCarthy's roots were planted in a pumpkin field and fertilized by the suspicion of Alger Hiss's treason". McCarthy, veteran jurist and U. S. Senator, never went so low as to write a thing like that. There is a suspicion in the minds of us Midwest yokels that the intellectual eggheads of the East are more ready to use a hatchet against a loyal, patriotic citizen, than to even

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admit the possibility that Communists do exist, much less recognize them when they meet and associate with them.

Z. L. BEGIN

Marshall, Minnesota

What Does Mr. Coulson Mean?

Re the one thousand word review of Richard Rovere's book *Senator Joe McCarthy* in your December, 1959, issue over Robert Coulson's signature, what does Mr. Coulson mean when he states "... this account of his career proves out to be a rich vein of spit-in-your eye individualism".

Does he mean that Senator McCarthy was a "spit-in-your eye individualist", or that Richard Rovere was a "spit-in-your eye individualist"?

Before he wrote his review, did Mr. Coulson read the masterly criticism of Rovere by L. Brent Bozell entitled *The Fantasy of Richard Rovere* re the slanders by Rovere appearing in Rovere's book? If not, let him read that article in the July 4, 1959, issue of *National Review*, of which Mr. Bozell is one of the editors, besides being, I believe, one of the prominent members of the American Bar Association as well as a close friend and former associate of Senator McCarthy in Washington.

And does Mr. Coulson know that another close associate of Senator McCarthy, Roy Cohn, who was also slandered in the same book by Rovere, has filed suit against Rovere for $1,000,000 damages—for verification see *National Review* for September 14, 1959. And Mr. Cohn will give Mr. Rovere an expensive lesson which he certainly needs.

JOHN F. KAVANAGH

New Smyrna Beach, Florida

He Liked Mr. Palmer's Article

A thousand thanks to Ben Palmer for writing, and to you for publishing in the November JOURNAL his scholarly piece on the merit and the influence of Roman law.

Articles of this type expand the lawyer's vision and imagination — and keep his mind at stretch. And the loveliness of Palmer's diction may well inspire lawyers to write better.

LOUIS S. GOLDBERG

Sioux City, Iowa

The Bar Needs Better Qualified Lawyers

. . . It is true that the Bar is overcrowded. This moreover bears directly upon the study of "Professional Responsibility" undertaken and explained by no less a personage than our able Past President, the eminent Ross L. Malone, in his farewell address before the Annual Meeting in Miami earlier this year. If one reads between the lines of Marion Edwyn Harrison's letter in the December issue, the Bar contains too many with physical, mental and moral aberrations—not that it is overstaffed per se. There have been numerous, intelligent law students and qualified practitioners who have fallen into disrepute some years after engaging in active practice. This has heaped disgrace upon themselves and upon the profession as a whole. The reasons, therefore, would be most didactic and enlightening in the current attempts of all bar associations toward the better understanding of "Professional Responsibility".

In conclusion, I think I echo the sentiments of the legal profession in trying to determine the underlying causes of lack of fully qualified members at the Bar by quoting from Mr. Harrison's remarks themselves, "... if these attorneys who ought not to be members of the profession had been eliminated at the beginning ..." I wonder would Mr. Harrison care to tell us *how* this will be accomplished?

EMORY F. COHN

Roswell, New Mexico

Nominating Petitions

Illinois

The undersigned hereby nominate Karl C. Williams, of Rockford, for the office of State Delegate for and from Illinois to be elected in 1960 for a three-year term beginning at the adjournment of the 1960 Annual Meeting:

Tappan Gregory, Benjamin Wham, Richard Bentley, Harold A. Smith, Jerome S. Weiss, Floyd E. Thompson, Daniel M. Schuyler, Laird Bell, Clarence H. Ross, James P. Hume, Cushman B. Bissell, T. I. McKnight, Abe R. Peterson, Katherine D. Agar, and E. Douglas Schwantes, of Chicago;

Charles A. Thomas and Stanton E. Hyer, of Rockford;

Bernard J. Moran, of Rock Island;

Henry C. Warner, of Dixon;

Charles E. Feirich, of Carbondale;

Russell N. Sullivan, of Urbana;

Clarence W. Heyl and John E. Cassidy, Jr., of Peoria;

Charles Wham, of Centralia.

Clarence W. Diver, of Waukegan.

New Jersey

The undersigned hereby nominate John H. Yauch, Jr., of Newark, for the office of State Delegate for and from the State of New Jersey to be elected in 1960 for a three-year term beginning at the adjournment of the 1960 Annual Meeting:

Robert H. Steedle, Charles S. Moore and John Lloyd, Jr., of Atlantic City;

Edward T. Curry, John P. Hauch, Jr., James Hunter III, Charles A. Wolverton and Blaine E. Capehart, of Camden;

Sylvester C. Smith, Jr., Ralph E. Lum, Jr., Charles B. Niebling, Joseph J. Biunno, William F. Tompkins, C. W. Fairlie, Arthur L. Nims III, Nicholas Conover English, William J. Glading and Arthur C. Dwyer, of Newark;

Robert K. Bell and Joel A. Mott, Jr., of Ocean City;

Francis Caminetti, William W. Evans, Sr., John W. Hand, John F. Evans and Forster W. Freeman, Jr., of Paterson.

South Dakota

The undersigned hereby nominate Roy E. Willy, of Sioux Falls, for the office of State Delegate for and from the State of South Dakota to be elected in 1960 for a three-year term beginning at the adjournment of the 1960 Annual Meeting:

Joe L. Maynes, Lloyd C. Richardson, Jr., Joseph H. Barnett and Mose S. Lindau, of Aberdeen:

John F. Lindley of Chamberlain;

John W. Larson, of Kennebec;

E. D. Roberts and Warren W. May, of Pierre;

Kelton S. Lynn and H. F. Fellows, of Rapid City;

Charles Lacey, Gene E. Pruitt, Joe W. Cadwell, Merle A. Johnson, Laird Rasmussen, A. D. Sommervold, John B. Galloway, John E. Burke, G. J. Danforth, Jr., Robert G. May and Robert C. Heege, of Sioux Falls;

V. A. Vrooman, of Vermillion;

Alan L. Austin, O. E. Beardsley and Ross H. Oviatt, of Watertown.

Washington

The undersigned hereby nominate Richard S. Munter, of Spokane, for the office of State Delegate for and from the State of Washington to be elected in 1960 for a three-year term beginning at the adjournment of the 1960 Annual Meeting:

Frank E. Holman, J. Paul Coie, Philip D. MacBride, Alfred J. Schweppe, Mary Ellen Krug and Otto B. Rupp, of Seattle;

Clarence A. Orndorff, Benjamin H. Kizer, F. J. McKevitt, Kenneth E. Gemmill, Philip S. Brooke, Charles F. Scanlan, Thomas Malott, R. Max Etter, John Huneke, William J. Powell, Hart Snyder and Horton Herman, of Spokane;

Joseph H. Gordon, F. D. Metzger and Charles D. Hunter, Jr., of Tacoma;

V. O. Nichoson, Nat U. Brown, John Gavin and E. F. Velikanje, of Yakima.

Make Your Hotel Reservations Now!

The Eighthy-Third Annual Meeting of the American Bar Association will be held in Washington, D. C., August 29-September 2, 1960.

The January, 1960, issue of the JOURNAL carries a complete announcement with respect to hotels, registration, etc., and in requesting accommodations please use the hotel reservation application therein provided.

Attention is called to the fact that many interesting and worthwhile events of the meeting will take place on Sunday, August 28, preceding the opening sessions of the Assembly and the House of Delegates on Monday, August 29.

Requests for hotel reservations should be addressed to the Registration Department, American Bar Association, 1155 East 60th Street, Chicago 37, Illinois, and must be accompanied by payment of the $35.00 registration fee for each member for whom reservation is requested. This fee is NOT a deposit on hotel accommodations but is used to help defray expenses for services rendered in connection with the meeting.

Be sure to indicate three choices of hotels, type of accommodations desired and by whom you will be accompanied. We must also have definite dates of arrival and departure.

Recent Trends in the Criminal Law

Mr. Doub devotes his attention to two aspects of criminal law: the problem of setting up standards to guide judges in imposing sentences and the need for some revisions in the work of the United States Commissioners. The article is taken from an address delivered before the Section of Criminal Law at the Association's 1959 Annual Meeting in Bal Harbour/Miami Beach last August.

by George Cochran Doub • *Assistant Attorney General of the United States*

THE MOST CONSPICUOUS trend in criminal law in recent years has been the new look at some of our established concepts accompanied by an eagerness to overhaul well-defined notions and principles. During the past five years, there has been more inquiry, study and questioning of the method of our system of criminal justice than in any prior period in our history. Re-evaluation has included the causes of crime, the criminal court process, sentence, probation, parole and custodial care. It is difficult to avoid the conclusion that this ferment indicates an underlying dissatisfaction with our simplified treatment of crime and punishment in the modern society.

Commissions for the study and revision of criminal codes have been appointed in a number of states, and the State of Wisconsin has recently proceeded further and adopted a new, more direct and less ambiguous code. The painstaking work of the American Law Institute in the development of its Model Penal Code is attracting increasing attention and even proposed sections contained in its tentative drafts have achieved sufficient recognition to be cited in Supreme Court opinions. I have no doubt that the Model Penal Code proposals will make notable contributions to the complex problem of reconciling criminal justice with desirable theories of social justice to the advantage of both the individual and society.

In recent years, recognizable tendencies of court decisions have favored the development of new and sometimes novel aids in the defense of federal and state criminal prosecutions. Standards for the admissibility of confessions have been made more exacting by the assertion of the doctrine that a confession, taken at a time when the accused is in custody but has not been promptly brought before a committing magistrate, is inadmissible, even though there may be no actual evidence of duress or coercion. Judicial sanctions with respect to improprieties of searching or arresting officers under *McNabb, Mallory* and other decisions have taken the form of a denial of admissibility of the prejudicial material which may have been obtained. The right to pretrial and trial discovery of the Government's documentary evidence has been extended.

Not only the police have been singled out for tighter standards of conduct, but the trend has been in favor of requiring prosecutors and trial judges to meet more meticulous criteria. Far less latitude is permitted the Government in jury argument than is allowed the defense. Convictions may be reversed upon the ground that comments of the trial court upon the evidence may have been susceptible of prejudicial interpretation or its instructions to the jury contained overemphasis or underemphasis.

Another interesting factor may be the greater attention accorded to the defense of insanity than prevailed in the less recent past. The trial court's instructions to the jury with respect to mental disease are reviewed by appellate courts with particular care and reversals in cases of this kind have been frequent, particularly in the District of Columbia, where the Court of Appeals has been attempting to develop a more broad, and less definite, rule than that of *McNaughton*, which prevails in most courts elsewhere. May I make here one brief addendum to all that has been written on the respective merits of *Durham* versus *McNaughton*. The indefiniteness of the *Durham* rule and its failure to elicit acceptance in other jurisdictions, as well as the rigidity of the *McNaughton* standard, suggest that the little known provisions of the British Homicide Act of March, 1957, may be of significance for us. That act contains a test of responsibility which may meet many of the criticisms of the other rules. Section 2(1) provides:

> 2.—(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or

induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

It is too soon to evaluate the effect of these recent currents upon the administration of justice. Although the adversary method of criminal law in the United States bears little relationship to a scientific inquiry into the ascertainment of truth, those in closest contact with the system believe that it works reasonably well. Experience suggests that great constitutional principles contain such appealing and dynamic elements that it is difficult to restrain their extension beyond reasonable limits. The most compelling danger is not from the acceptance of a fallacious postulate but in the application of a valid principle to an abnormal extreme. Whether the judicial decisions to which I have referred unduly advantage the accused and excessively increase the handicap of the state in law enforcement at a time when crime presents such a monumental social problem, history must determine.

There are many matters I have touched upon warranting detailed analysis but, since space limitations do not permit this, I have selected for review a few aspects of the criminal law which have attracted some attention but not enough.

Capricious Sentences— A Cause of Dissatisfaction

Particular dissatisfaction has been manifested lately with respect to the vagaries involved in our present methods of sentencing. The sometimes grossly excessive or grossly inadequate punishment and the conflicting standards applied by the same, as well as different, trial judges have suggested to some that the power of sentence is too delicate and too powerful a function to be lodged in one man without supervision. After giving a number of examples of seemingly capricious sentences, Chief Judge Simon Sobeloff of the Fourth Circuit Court of Appeals has concluded:

> Such fantastic vagaries tear down the mightiest sanction of the law—respect for the courts. We have good and wise men on the bench, but not all are wise and good; and even the best and most prudent, being human are, like Homer, liable sometimes to nod. The truth is that passing sentence is too delicate and too powerful a function to lodge in any man's hands entirely unsupervised.

Under the civil law of Western Europe, sentences are imposed by multiple-judge trial courts. In no criminal court under the civil law system of Western Europe is one judge permitted to fix a punishment involving the loss of life or liberty of a citizen. In addition, statutes attempt to formulate and define the aggravating and mitigating circumstances which the trial judges are directed to consider.

The United States is the only country in the free world where a sentencing court need give no reasons for the imposition of a sentence. In every other country the decision of the court on matters of punishment must be supported by detailed explanation. As Professor George has said, with respect to foreign courts, "The decision of the court on matters of sentence, in contrast to the stark declaration of the sentence practiced in this country, must be supported by reasons at least as detailed as those which support the finding of guilt itself."

The United States appears to be the only country in the free world in which there is no appellate review of the punishment imposed by the trial court. Under the civil law, courts of appeal are authorized to make independent findings of fact with respect to sentences. Appeal may be brought by either the Government, the accused or the injured party. In most civil law jurisdictions the appellate court is only permitted to reduce, not increase, the sentence, although in Italy the sentence may be either increased or reduced.

Under the civil law a sentence upon appeal is evaluated upon the basis of the degree of consistency between the sentence imposed and sentences imposed in other courts for similar offenses. Accordingly, the appellate courts tend to bring the sentences reviewed toward a common denominator or common standard. If a particular sentence deviates conspicuously from the usual measure of punishment for similar crimes, it is modified.

The English system has completely departed from the common law tradition of limited appellate review in criminal cases.

Under the Criminal Appeals Act of 1907 a convicted person may, by leave of the Court of Criminal Appeals, appeal a sentence following conviction unless the sentence is one determined by law. If the court is of the opinion that a different sentence should have been imposed, it may pass any sentence warranted under the circumstances, whether more or less than that originally ordered. The possibility of an increased sentence upon appeal discourages frivolous appeals from the sanctions imposed. In the Commonwealth countries, the accused, the government or the injured party may appeal matters of sentence, and in these jurisdictions sentences have on occasion been substantially increased despite objections by the non-appealing defendant.

Under the British system appellate judges consistently refuse to interfere merely because they, sitting as a trial judge, might have fixed some other punishment. They only interfere when matters of principle are involved. The requirement that no one may appeal the sentence imposed except with permission of the appellate court and the comparatively few permissions granted have held the number of sentences reviewed to a minimum. In the period from June, 1948, to August, 1949, only ten appeals against sentence were heard by the English Court of Criminal Appeals. In five the sentence was affirmed, in four the sentence was reduced and in one the sentence was increased. In 1956 leave to appeal against a sentence was permitted in six cases, in two the sentence was affirmed, in three the sentence was reduced and in one the sentence was increased. In the Commonwealth countries appeals from sentences have likewise not been numerous.

The value of this appeal right from sentence may not be determined by either the number of appeals or the percentage of affirmances or modifications. The existence of the appeal privilege inevitably results in lower courts

conforming to a considerable degree in their sentencing standards to those defined in appellate decisions. The tendency is against extreme harshness of punishment or extreme leniency.

In the federal system we insist upon strict and highly technical requirements for the protection of the rights of the accused during trial, although the issue of guilt may not even be doubtful. Yet we provide a total absence of safeguards when the ultimate and most difficult problem is reached as to the disposition to be made of the convicted person. Here the trial judge is given in the federal system, and in most state jurisdictions, the widest latitude of discretion. He may impose the maximum prison sentence, he may suspend the sentence, he may prescribe probation, he may impose a nominal fine. There are no guides for the judge and he follows his sense of justice which, like the Chancellor's foot, varies from judge to judge. Justice Cardozo once wrote that "the present system, in the view of many is as irrational in its mercies as in its rigors, and in its rigors as in its mercies". So in a particular case the sentence lies practically uncontrolled in the understanding and the conscience of the judge, the criteria applied being vague, if not non-existent.

No Record of the Reasons for the Sentence

Although the character of the sanction to be imposed may be the most difficult problem in a criminal case, it is not the practice in the federal system for the appellate record to contain any information as to the reasons why the District Judge imposed the particular sentence. Indeed, there is no requirement in the Federal Rules of Criminal Procedure that the District Court state its reasons for the imposition of the sentence made and, if the District Court does state its reasons, the appellate record omits this significant information.

I believe that the Federal Rules of Criminal Procedure should be amended to require the District Court to make a statement of record as to the reasons for his sentence and to require the appellate record to include that statement. Sentences which, without explanation, may seem whimsical or oppressive to an appellate court may have had in fact a reasonable basis. The requirement I suggest should result in fewer fallacious assumptions by the appellate court and should cause the District Courts, in defining their reasons for the particular sentence on the record, to develop an even more careful and objective approach to their difficult problem.

Upon the recommendation of the Attorney General, Congress enacted in 1958 a statute providing for the holding of sentencing seminars by Federal District Judges in each circuit for the purpose of improving sentencing techniques and of developing an acceptance by Federal District Judges of some standards of uniformity and consistency. In July, 1959, a highly successful initial test seminar, attended by fifty Federal District Judges from throughout the country, was held in Boulder, Colorado, and it is expected that comparable circuit seminars for Federal District Court Judges will follow. The objective of these discussions by trial judges and the resulting exchange of ideas is to accord the Federal Judges themselves an opportunity to assume the initiative in eliminating sentences which may appear biased, capricious or the result of defective judgment. It is expected that the seminars will enable federal trial judges to develop a less subjective approach when exercising their onerous responsibility of determining the extent to which their fellow citizens shall sustain a loss of personal liberty. The Department of Justice is hopeful that these exchanges of individual views of the judges at these seminars may result in the development of reasoned sentencing norms or standards for particular offenses. Only after sentencing judges become conscious not only of standards but of the *same* standards of sentence for an offense should they proceed to consider the individualized factors of extenuating or aggravated circumstances, the past record of the person, character, remorse and other elements associated with social justice.

Although perhaps not adaptable to the federal system except in multiple-judge urban areas, the new Massachusetts system of sentence review should be given careful consideration. In that state, since 1943 there has been established an Appellate Division of the Superior Court consisting of three judges designated by the Chief Justice for the hearing of appeals by an inmate of the state prison aggrieved by his sentence or by the state. An appeal must be made within ten days of the imposition of sentence. The committing judge may file a statement of his reasons for the sentence within seven days after the appeal is filed. The Appellate Division can consider all such appeals with or without a hearing, may make any disposition of the case which could have been made at the time sentence was imposed, but may not increase the sentence unless the prisoner is accorded a hearing. Two judges constitute a quorum and no judge sits on an appeal from a sentence which he imposed.

The judges who have served on the Appellate Division are enthusiastic about its success and believe that this procedure has brought about much better sentencing. They also report that

George Cochran Doub is Assistant Attorney General of the United States in charge of the Civil Division. A former United States Attorney for the District of Maryland, he is a graduate of Johns Hopkins University (B.A. 1923) and of the University of Maryland Law School (LL.B. 1927). During World War II, he served as a Navy officer with a carrier group in the Pacific.

there has been no criticism of the system by prosecutors, the courts, the press or the public. The principal objections of substance to appeals from a criminal court sentence appear to be avoided by the Massachusetts system of providing for informal appellate review by trial judges.

A reflex of the current dissatisfaction with existing sentencing methods has been the repeated efforts of the Congress and state legislatures to restrict the discretion of trial judges by making mandatory fixed prison sentences for particular crimes. Such statutes generally are adopted as an angry reaction to some publicized offenses, are designed to destroy any discretion of the trial courts and implicitly manifest a lack of confidence in them. By statute the armed robbery of a post office carries a mandatory sentence of twenty-five years. The penalties provided for in the Narcotics Control Act make it impossible for a judge to distinguish between the drug racketeer on the one hand and a hapless victim of the racketeer on the other.

I believe that these Draconian laws, hard and inflexible, are basically unsound because they preclude discriminating judgment, the exercise of compassion and the use of any lubricating common sense. The artificial rigidity of such statutes, denying any consideration of mitigating circumstances, has resulted in trial judges, juries and appellate courts deflecting the impact of the laws by strained and unnatural constructions.

Another constructive development during the past few months has been the decision of the Judicial Conference of the United States to make a comprehensive study of the United States Commissioner system. You will recall that the Commissioners, who act as committing magistrates, issue warrants for arrest and search, conduct preliminary examinations, commit prisoners for trial and set bail. When authorized by the District Courts, Commissioners try petty offenses originating in the federal enclaves. In spite of their important work, the Commissioners have been the "lost brethren" of the federal judicial system. Few members of the Bar have been acquainted with their functions and the lack of interest in their work is best indicated by the fact that, as far as I know, the law review article of Mr. Kestenbaum and myself, in the *University of Pennsylvania Law Review* for March, 1959, is the only published article attempting to analyze their functions.

I am convinced that the important but little-known work of the United States Commissioners needs a major overhaul. It is my hope that the study directed by the Judicial Conference will result in the abolition of the archaic fee system of compensation for United States Commissioners, which requires them to look to their fees, fines and bail forfeitures for their compensation, and the substitution of fixed salaries. It is a return to medievalism for the federal system to compel magistrates to have a personal pecuniary stake in their judicial or quasi-judicial acts. I am also hopeful that, although the power of appointment of Commissioners continue to remain in the Chief Judge of each district, who is particularly familiar with the qualifications of members of the Bar, the Judicial Conference of the United States will establish minimum standards and qualifications which must be applied in the appointment of the Commissioners.

And finally, the Commissioners should be vested with authority to try all federal petty offenses, not because such offenses are burdensome upon the District Courts, but because it is oppressive and onerous for persons to be charged and tried upon minor offenses in the Federal District Courts. Federal justices of the peace should handle such cases for the same good reasons that comparable offenses have been handled for more than a century by state justices of the peace throughout the United States.

In conclusion, may I suggest that the notable current interest in the re-examination and re-evaluation of our system of criminal justice is a wholesome development. Any civilization must be judged to a considerable extent by its treatment of the historic problems of crime and punishment. In this area we deal with great problems and they require the very best thinking on the part of the Bar, the Bench and the public.

Traffic Courts: The Judge's Responsibility

Judge Levin discusses the responsibilities of the traffic court judges in dealing with the continuing problem of highway safety. While the judges alone cannot solve the problem, he points out that their attitudes and their conduct of their offices have a great influence on the attitude of the public. The article is taken from an address delivered before the University of California's Traffic Court Conference held early last year.

by **Gerald S. Levin** • ***Judge of the Superior Court of the State of California***

HUNDREDS, THOUSANDS, yes, millions, think traffic safety is important. Just about everyone talks about it, but too few people do anything about it unless and until a tragedy strikes at them. More and more Americans have taken to the wheel in the last decade, adding comfort and pleasure to their lives. At present there are nearly seventy million vehicles and drivers on the highways of the United States. Of the foregoing number approximately 7,700,000 vehicles and drivers are in the State of California alone. Yet the comfort and pleasure enjoyed by millions has too frequently turned to misery, disability and death. About four Americans die in traffic accidents every hour and 150 are injured during the same sixty minutes. The following 1958 statistics in round figures may be of interest:

United States:
Deaths 37,000, injuries 1,500,000
Economic loss, $5,500,000,000

California:
Deaths 3,500, injuries 135,000
Economic loss, $565,000,000

About one out of every hundred persons is a statistic—a pain-racked survivor or a name in the obituary column. The passing scene of highway history is littered with the accumulated wreckage of fifty years of accidents. It is strewn with the mangled bodies of more than a million killed and numbers about fifty million injured. Its economic waste soars into the billions. Unless there is some improvement, with the increasing population and greater number and power of motor vehicles it should take only half the time to accomplish the same violence, destruction and carnage in the future.

You know the principal causes—discourtesy, worry, fatigue, lack of self-control, poor coordination, physical disabilities, mechanical defects and others. In about twenty-four out of every hundred fatal accidents the driver or pedestrian had been drinking alcohol. Speeding is the most usual cause of fatalities.

The Three Es

There are three important approaches to accident prevention and the determination of cases involving motor vehicle violations, commonly referred to as the three "Es": first, education; second, engineering; and third, enforcement.

A. *Education*

Literally reams of material have been published by the American Bar Association, state bar associations, universities such as Northwestern and New York, the President's Committee for Traffic Safety, governors' safety committees, safety councils, the Boy Scouts, the Inter-Industry Highway Safety Committee, Inc., insurance companies, oil companies, automobile companies, trucking companies and numerous others. Traffic judges should be well educated on this subject and the reading of that literature is recommended. Customarily the term "education" in connection with traffic safety is applied to the task of educating drivers and pedestrians to the hazards of modern traffic, but education in the sense I use it here refers to the knowledge possessed by the traffic judge. It goes without saying that the traffic judge should be expert on the subject of traffic laws and court decisions applicable thereto. Traffic judges, like all other judges, must have adequate training and background necessary for the performance of their duties. They should be selected according to the same standards of training, temperament and ability that are used to select members of other branches of the judicial structure. Too many times traffic judges are not decisive because of their lack of knowledge of the law.

B. *Engineering*

The subject of engineering is important because in every traffic situation a vehicle, a highway and a driver are involved. Two of these, the vehicle and the highway, are mainly engineering problems. The automotive engineer who designs and builds our vehicles has done a good job. However, the things that happen to the car's mechanism after it comes off the assembly line are of concern to the judge. Although it is difficult to determine, it

is believed that vehicular defects cause about 15 per cent of our accidents.

Many new models of cars offer either incorporated or optional safety features that upgrade the chance to survive an accident, even a severe collision or roll-over. Some of these are improvements in the basic construction such as padded dashboards, shock-absorbing steering wheels, child-proof inside door locks, safety belts, safety glass, puncture- or blowout-resistant tires. Information about streets, highways, freeways, signs, widths of lanes, center barrier strips, radio warning signals, use of radar, average stopping distances, reaction distance, braking distance, chemical tests and equipment, and many other related matters are useful in the intelligent consideration and disposition of cases by a traffic judge.

Frequently violators misstate the physical facts or dispute an officer's statement of the facts and it is most helpful to be able to determine the matter without resort to expert testimony. Generally if a judge demonstrates knowledge of the true situation, a defendant will at a hearing accept his version.

Obviously a judge is not expected also to be a safety engineer or a highway engineer, or, for that matter, any kind of an engineer, but I am sure a basic knowledge of some of the physical aspects involved in traffic cases enable the judge to dispose of cases firmly and expeditiously.

C. *Enforcement*

This leads me to a consideration of the judge's responsibility in the enforcement of traffic laws, rules and regulations. The ultimate responsibility of a judge in this area is the proper consideration and disposition of cases that come before him. In order to accomplish this, however, the traffic judge should have a broad knowledge of the entire subject of enforcement which involves, first, motor vehicle and drivers' licensing; second, police activities relating to motor vehicles in accident cases; third, the law; and, fourth, the court.

1. *Motor vehicle and drivers' licensing*

Motor vehicle and drivers' licensing laws and regulations are subject to legislative and executive control, but it is at least the responsibility of a judge to study and know the requirements and insist on strict compliance therewith. Although judges are not charged with the responsibility of writing the laws, certainly the views of the traffic judge in regard to traffic rules and regulations are entitled to great respect. Their views, expressed through proper channels, may be most effective in the establishment of proper licensing requirements.

2. *Police activities relating to motor vehicles in accident cases*

Efficient accident investigation and reporting by trained police officers is essential to the success of a law enforcement program. Accident investigation and reports serve accident prevention in several general ways:

(1) by determining the causes of accidents;

(2) by developing a pattern of accidents which discloses highway frequent-accident locations;

(3) by showing the types of violations causing accidents and times of occurrence;

(4) by developing records of operations of drivers, pedestrians and vehicles involved in accidents; and

(5) by providing statistics to guide and furnish material for programs of improvement.

With all of the foregoing, judges must be familiar. If investigations are not being conducted properly and satisfactory reports submitted to judges where they are required for the adjudication of cases, judges should exert their influence to have such a situation remedied.

It is upon the police reports that a great portion of the cases in San Francisco are adjudicated and judges cannot execute their duties efficiently unless such reports are prepared in a thorough manner.

3. *The law*

When it comes to the subject of the law, of course the judge should have a thorough knowledge of existing traffic statutes both state and local. It is not his duty to interfere in any manner with legislative action but in this specialized field, because of his knowledge of the subject, his recommendations should be of great value. Needless to say, he is charged with the responsibility of applying existing case law which may be pertinent in any case before him.

4. *The court*

I have heard it said that too many judges think that their responsibility begins and ends in the courtroom. This certainly is not true of a traffic judge, as I have endeavored to indicate heretofore. But the courtroom is the place where, to quote Socrates, the judge is "to hear courteously, to answer wisely, to consider soberly and to decide impartially". Order and decorum in the courtroom are primary responsibilities of the judge. Respect for the American system of justice will be in direct ratio to the ability of the judge to perform his duties in the manner suggested by Socrates. This is especially true of a traffic judge, for it is in the traffic courts of our nation that the greatest number of our citizens feel the impact of our system of jurisprudence. It is estimated that approximately five million people, in the main law-abiding citizens, face traffic judges each year. Generally these people have never been in a court of justice before and their first impression of American justice is likely to have great influence in their thinking about our democratic system of government.

Some time ago the National Safety Council, on behalf of the National Committee for Traffic Safety, employed a research organization to determine the public's attitudes on traffic safety. A natural element of this research was the opinion of the people who had been to traffic court. What was the result?

Sixty-two per cent said, "I was satisfied. The court was fair", or, "I was guilty", or "The court decided in my favor."

Twenty-three per cent said: "I was dissatisfied"—and here were their reasons:

1. "The court was corrupt—it was 'fixed'."

2. "The settlement was unfair. There was no reason for the fine."

3. "I didn't get a chance to defend myself."

4. "Fine was too high."
5. "The court personnel were rude, abrupt and sarcastic."

The balance of 15 per cent gave other answers, or didn't know what to say.

A Real Cause for Alarm

It would be foolhardy to contend that prejudice did not have some effect on these answers. In theory we have no worry about the 62 per cent who were satisfied. But even with the elimination of prejudice, the 23 per cent who were dissatisfied means that some 920,000 people each year get a poor impression of the traffic court, hence a poor opinion of our judicial system. This is a real cause for alarm and something must be done by traffic judges, civic groups and public-spirited citizens to correct such a false impression.

The paramount position of traffic courts was emphasized in the first resolution adopted by the chief justices of all the state supreme courts and approved by the Conference of Governors in 1952:

> RESOLVED, That the local courts of first instance have greater opportunities and therefore greater responsibilities than any other courts for (1) safeguarding life and limb from automobile accidents and (2) promoting respect for law on which free government necessarily depends.

Chief Justice Arthur T. Vanderbilt expressed this view in his David Beecroft Memorial Award address:

> What they see and hear—and sometimes smell—in these courts does not tend to create respect for law or for the judges and lawyers administering law. And people are coming to these courts by millions each year as defendants or as witnesses in traffic matters—20 million as defendants in 1951—in comparison with the relatively small number who experience justice from the courts of last resort in the state house. These local tribunals collectively can do more to undermine respect for law than the appellate courts can possibly overcome, try as they will. From the judicial point of view this aspect of the work of the traffic courts is quite as significant as the necessity of curbing the constantly growing loss of life and property. Thoughtful judges and lawyers do not need to be told that our kind of government cannot exist long once respect for law is destroyed.

Traffic judges have more influence in encouraging or discouraging respect for law because they touch directly the destinies of five to ten million individuals annually. These persons are from all levels of society, rich and poor, educated and uneducated, men, women and children of all races, creeds and religions. The sea of faces confronting a busy traffic judge daily represents "the great Melting-Pot" referred to by Israel Zangwill (*The Melting Pot*, Act I). All of them are entitled to equal justice. We are reminded frequently of the inscription over the entrance of the Supreme Court Building in Washington, "Equal Justice Under Law". As Chief Justice Earl Warren succinctly stated in his address at the John Marshall Bicentennial Observance, "That is our profession of faith. It is our goal." Most assuredly it must be the goal of traffic judges, for it is their responsibility to mete out justice to more persons than any other judges in our judicial system.

Courage is a great attribute to be possessed by a traffic judge but I remind you that it should be used soberly in the application of even-handed justice.

This leads me naturally into the responsibilities of a judge in the discharge of perhaps the most important and difficult task that confronts him—the determination and imposition of penalties. In my opinion whether a traffic judge is inclined to be lenient or severe in the imposition of penalties, the surest way to destroy public confidence in the operation of the traffic court and in the administration of justice is to mete out penalties in a preferential manner. This will only serve to make his position with the public weak and his tenure as a traffic judge troublesome. The converse is true also—the best way to encourage confidence and public support is to impose penalties fairly, impartially and fearlessly—oftimes a difficult task that will prove the mettle of any judge.

Although traffic judges must not be deprived of discretion in determining the nature and gravity of the offense, uniformity of punishment for all offenses committed under the same circumstances is a good rule to follow religiously.

It is generally true that traffic violators are ordinarily good citizens who, in a thoughtless or careless moment, violated a traffic law, and they should be considered apart from violators of the usual penal laws. Nevertheless, insofar as the judge's responsibility for sentencing is concerned, principles generally applicable to offenders may be recognized. In a recent publication of the National Probation and Parole Association the late Chief Judge Bolitha J. Laws of the United States District Court in Washington, D. C., a member of the Council of the American Bar Association's Section of Judicial Administration, said in the foreword:

> The sentencing of the convicted offender demands of the trial judge the best that he has in wisdom, knowledge, and insight, as a jurist and as a human being. Difficult as it is to do, he must constantly weigh in the balance the future course of life of the individual before him with his judicial

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> responsibility for the protection of the community.

And in the preface of this book Will C. Turnbladh, director of the aforementioned Association, stated:

> The judge's responsibility is a prodigious one and there can be no simple or rigid formula for him. The sentencing functions of our courts are crucial to the administration of justice and to the prevention and correction of crime.

In the text of the book the following appears:

> A sentence—the judge's determination of the punishment to be inflicted on a convicted offender—has two general objectives: deterrence and, especially in modern times, rehabilitation. Each of these is conceived as a preventive of further crime.

In regard to traffic violations I would substitute "education" for "rehabilitation" because (American Bar Association *Handbook on the Improvement of the Administration of Justice*, page 94) "The primary aim of the traffic court should be to impress defendants with the need for traffic law observance rather than to penalize." In doing so there must be imparted to violators requisite knowledge of the laws and encouragement to apply such knowledge properly. This involves the development of proper attitudes in drivers. Studies have shown that accident repeaters tended to have poor attitudes and such is the prime factor in accident causation rather than faulty skills of drivers. Attitudes are based upon psychological or emotional traits in various individuals. They have to do with the proper application of knowledge and skill and with a person's believing in something and reflecting this belief in his behavior. Attitudes are difficult to control but judges are in an excellent position to exercise some control by influencing drivers to operate vehicles in a safe, lawful and courteous manner.

Intent and willfulness ordinarily are not involved in the violation of traffic laws and therefore the primary objective is deterrence both as to the particular violator and others. Voluntary compliance with traffic laws by the public is the ultimate to be achieved. This can best be accomplished by the imposition of reasonable, certain and consistent penalties regardless of severity. Under ordinary circumstances moderate penalties will accomplish the objective in the great majority of cases but willful repeaters and those who flagrantly violate the law should be dealt with severely.

In my opinion, the most effective means of encouraging respect for and compliance with traffic laws are by either, first, ordering offenders to attend sessions of traffic violator schools, or, second, taking them off the road. The first method accomplishes two things of importance: first, it gives motorists knowledge of the seriousness of the traffic problem and an opportunity to learn about the traffic laws and the rules of the road, and, second, by providing motorists with this education, violators are informed of the nature of their mistakes and generally think more sensibly about the subject. Such education helps to reduce the risk taken by other drivers every time they operate a motor vehicle on our streets and highways. As an example, the Municipal Court in San Francisco, with the cooperation of the Board of Education and the Police Department, conducts a traffic violators' school in the evenings, which is most effective. On numerous occasions motorists are irked when ordered by the judge to spend two successive evenings in the traffic school, but many of them after attending the school have expressed appreciation for the training received. This penalty, in my opinion, is a far better means of insuring traffic safety than imposing fines for offenses of a minor nature. Traffic judges should remember that the real purpose of penalization is not for the collection of revenue but to provide a means of securing compliance with traffic laws.

Traffic Schools

This may be a good place to mention in passing the effectiveness of requiring traffic school instruction of juvenile offenders, and to refer to the excellent work being performed in high school traffic courses to insure better drivers for the present and the future.

The use of an automobile is a commonplace fact in the everyday existence of millions today and to be deprived of the right to drive is indeed a catastrophe. To penalize a young offender by the suspension or revocation of his license seems to be a double blow, but it is most effective. At times motorists have to be convinced that driving is a privilege, not a right guaranteed by the Constitution.

The effectiveness of discouraging future violations by taking drivers off the road has been demonstrated in seventeen jurisdictions, including California and Manitoba, Canada, where a variety of judicial point systems are in effect. This point system developed by the American Bar Association's Traffic Court Program Committee operates in the suspension of the driver's license generally by the administrative authorities for certain numbers of violations in various categories of offenses. The action of the administrator, of course, is based upon adjudication of offenses by a traffic judge.

Perhaps mention should be made of the fact that the American Bar Association recommends giving traffic judges wide authority to suspend licenses. In many states, such as California, the motor vehicle statutes strictly limit the authority of judges to suspend or revoke licenses; they may do so only for certain violations and for definite periods of time (California Vehicle Code, §§291-293). This is a subject upon which judges and administrators may disagree but the judge's authority should not be so circumscribed as to limit his effectiveness in removing from the road dangerous offenders other than by jail sentences.

Serious violations, such as drunk driving, require drastic treatment. That the public demands such treatment is indicated by the stringent laws passed by legislatures in recent years. For example, in 1957 the California Legislature provided for a mandatory jail sentence for a second conviction (California Vehicle Code Sec. 502), and permanent revocation of a license if that second conviction is within three years (California Vehicle Code Sec. 307). Jail sentences in many instances cause economic hardship to innocent persons but the welfare of the public is

(Continued on page 223)

A Note on the Appointment of Justices of the Supreme Court of the United States

The authors of this article have made a study of the men appointed to the Supreme Court of the United States whose confirmation by the Senate was delayed for an unusually long period or who, for one reason or another, failed to take their seats on the Bench.

by Henry J. Abraham and Edward M. Goldberg

WHAT ARE THE elements which affect the confirmation of Justices of the Supreme Court? What factors are likely to cause obstruction or delay of confirmation? Why do some men appointed fail of confirmation? What factors have caused men who were appointed and confirmed to refuse to accept their commissions or fail to serve on the High Bench? These are the general questions which this study attempts to answer.

The period upon which the inquiry focuses its emphasis is primarily that which elapses between the date on which the President sends to the Senate the name of the man chosen by him and the date on which the appointment is confirmed or rejected. If difficulties arise, they usually appear to do so at this point in the procedure. The reason for using as our first date the one on which the appointment is sent to the Senate, is that recess appointments would introduce a considerable bias into the results, since a recess appointment may be made several months before the Senate actually meets and is able to act on the President's nomination. In addition, the study focuses on the post-confirmation period in order to discover the reasons why some men who are confirmed refuse to accept commissions or otherwise fail to take their places on the Supreme Court.

An examination of the two sets of dates (that on which the appointment was sent to the Senate, and that on which it was confirmed), indicates that, as might be expected, *the average period elapsing before confirmation has grown longer through the years.* When the Supreme Court was first constituted, and for a considerable period thereafter, the typical interval was one or two days. Halfway through the Court's life, in the 1870's, it was not unusual for confirmation to be delayed from one to three weeks. At the present time there is considerable fluctuation, and although confirmation in one or two days still occurs sometimes, as was true of the appointment of Mr. Justice Burton in 1945, the delay is likely to be at least a month.

An obvious inference which may be drawn is that as the role of the Court has developed, the importance of the office of Supreme Court Justice has been more and more clearly recognized. The Senate has become increasingly cautious about the placement of such great potential power in the hands of men over whom there is no direct popular control. The examination of the reasons why men who were appointed and confirmed, but subsequently declined to serve, also indicates the greatly enhanced prestige of the office.

I. Unusual Delays

For our purposes, an "unusual delay" is one which is markedly longer than that which normally took place during the period in which the appointment was made. Thus, a delay of one month in 1826 was as "unusual" as a delay of six months would be at the present time, but a delay of one month today would be a common occurrence. A chronological examination of the men who were delayed indicates not only that the periods of delay have tended to lengthen, but, more important, they indicate some of the factors which cause the delay to occur. We shall now examine the more significant "unusual delays":

ROBERT TRIMBLE: confirmation delayed one month in 1826. Two factors appear to have been responsible. The first was the opposition of Senator Rowan, of Kentucky, Trimble's home state. This early attempt at the use of senatorial courtesy failed because of the support given Trimble by Secretary of State Henry Clay and Senator Thomas Benton, of Missouri. The second was that Trimble, while serving on the circuit court, had tended to support national powers at the expense of state powers, thus incurring the wrath of the supporters of state's rights.

ROGER B. TANEY and PHILIP P. BARBOUR: confirmation in each case delayed two and a half months in 1835. The opposition to Taney and Barbour was not directed as much against the nominees as it was against the nominator, President Jackson. However, the

The authors gratefully acknowledge the aid of Norma Jacob and other members of the senior author's graduate seminar in constitutional law.

Table I

Ages of Supreme Court Justices at Time of Appointment

32	2	51	4
33	–	52	5
34	–	53	6
35	–	54	3
36	1	55	6
37	–	56	8
38	1	57	7
39	–	58	2
40	–	59	5
41	3	60	4
42	1	61	1
43	–	62	7
44	6	63	–
45	2	64	1
46	3	65	2
47	2	66	–
48	2	67	1
49	5	68	1
50	3	69	1

The range is from 32 to 69, with a median age of 54. Forty-nine of the 95* justices were in their fifties when appointed.

*Counting Hughes, Hone, and White *twice*.

anti-Jackson faction—led by Clay, Webster and Calhoun—which fought hard against confirmation, did not prevail against Jackson's strong leadership and influence which were backed up by his immense popularity with the electorate.

BENJAMIN B. CURTIS: confirmation delayed just over three months in 1851. Opposition to Curtis was based on the belief that he opposed the abolitionist cause and supported the Fugitive Slave Law. (It may be noted that Curtis was the only Justice to *oppose* the Dred Scott decision, and in fact, felt so strongly that he resigned from the Court.)

JOSEPH P. BRADLEY: confirmation delayed six weeks in 1870. The opposition to Bradley was based on what was thought to be his position on the Legal Tender Cases, and he did subsequently vote as his opponents had feared. In addition, there was a demand for the appointment of a bona fide Southerner to the Court, and Bradley was from New Jersey.

JOHN MARSHALL HARLAN (Sr.): confirmation delayed six weeks in 1877. While his youthfulness (44), his lack of public experience, and his role in the disputed election of 1876 were cited against him, the real cause of the delay appears to have been the activity of Senators Timothy Howe, of Wisconsin, and Isaac Christiancy, of Michigan, both of whom hoped to gain the appointment for themselves.

LUCIUS Q. C. LAMAR: confirmation delayed one and one half months in 1887. There was substantial Republican opposition to a man who had followed his state, Mississippi, out of the Union, fought against the United States, then returned—unrepentant—to the Senate, where he defended his actions. While his age (63) and his lack of judicial experience were the ostensible reasons for opposing him, his "unrepented national disloyalty" was the real cause for the delay. His confirmation would not have been possible if two Republican Senators had not abandoned their party's position at the time of the Senate floor vote.

MELVILLE W. FULLER: confirmation as Chief Justice delayed two and one half months in 1888. Fuller's confirmation was delayed because of party politics. Senator Edmunds, of Vermont, the Republican Chairman of the Judiciary Committee, claimed that President Cleveland had promised him that a man from his state, Edward Phelps, would be appointed. Cleveland denied this after he nominated Fuller. As a result, Edmunds turned the issue into a partisan political fight of Republicans versus Democrats, and only the defection of a few Republican senators saved Fuller's appointment.

JOSEPH MCKENNA: confirmation delayed five weeks in 1897. McKenna's major problem was his friendship with Leland Stanford, the California railroad magnate. During this time the supporters of the Sherman Antitrust Act were eyeing the railroads and they feared a "railroad justice" on the Court. In addition, some opposition to McKenna appears to have been caused by the fact that he was a Roman Catholic, and a co-religionist, Mr. Justice White (later to be promoted to the Chief Justiceship), had been appointed to the Court only four years earlier.

MAHLON PITNEY: confirmation delayed one month in 1912. The interesting new element here is that Pitney was opposed by labor, which was just beginning to make itself felt as a political force. (*Cf.* the rejection of John J. Parker *infra.*)

Table II

Political Affiliation of Supreme Court Justices at Time of Appointment

Federalists	13
Whig	1
Democrats*	44
Republican	35
Independent	1

Presidents who appointed Justices of a party other than their own:

Tyler (Whig) appointed one Democrat (Samuel Nelson)

Lincoln (Republican) appointed one Democrat (Stephen J. Field)

B. Harrison (Republican) appointed one Democrat (Howell Jackson)

Taft (Republican) appointed two Democrats (Horace Lurton and Joseph Lamar) and promoted one Democratic Associate Justice to Chief Justice (Edward D. White)

Harding (Republican) appointed one Democrat (Pierce Butler)

Hoover (Republican) appointed one Democrat (Benjamin Cardozo)

F. D. Roosevelt (Democrat) appointed one Independent (Felix Frankfurter) and promoted one Republican Associate Justice to Chief Justice (Harlan F. Stone)

Truman (Democrat) appointed one Republican (Harold H. Burton)

Eisenhower (Republican) appointed one Democrat (William J. Brennan, Jr.)

*Includes 7 Jeffersonian Republican-Democrats.

LOUIS D. BRANDEIS: confirmation delayed for more than four months in 1916. The fight over the confirmation of Brandeis was the longest in the history of the Court. President Wilson nominated Brandeis on January 28, 1916; he was not confirmed until June 1. The vote was 47:22; the majority comprised all the Senate Democrats except one, plus its three Progressives. All of the Republicans and one Nevada Democrat voted to reject. However, some observers feel that the opposition to certain other justices, notably Hughes as Chief Justice and Warren to the same office, was actually more bitter. A great deal of the opposition to Brandeis was based on his alleged lack of judicial temperament. In addition,

Table III

States from Which Supreme Court Justices Were Appointed (29 States)

New York	13	North Carolina	2
Ohio	10	Iowa	2
Massachusetts	8	Illinois	2
Pennsylvania	6	Michigan	2
Tennessee	6	New Hampshire	1
Kentucky	5	Maine	1
Maryland	4	Mississippi	1
New Jersey	4	Kansas	1
Virginia	3	Wyoming	1
South Carolina	3	Utah	1
Connecticut	3	Minnesota	1
Georgia	3	Texas	1
Alabama	3	Indiana	1
California	3	Missouri	1
Louisiana	3		

his avowed opposition to bigness in business undoubtedly was a major factor in delaying his confirmation. A prominent member of the Boston Bar, Josiah H. Beaton, described him as follows: "He has brooded over such subjects as the rights of labor until he has reached a point where it is impossible for him to be fair." From this point it was only a step to the allegation that he had been guilty of improprieties. A third factor underlying some of the opposition was anti-semitism, but it was never explicitly stated in the record.

ROBERT H. JACKSON: confirmation delayed over a month in 1941. Most of the opposition to Jackson appeared to stem from Democratic Senator Tydings, of Maryland, who had a personal feud with Jackson because, as Attorney General, the latter had failed to prosecute two Washington columnists for what Tydings alleged was libel in a radio broadcast.

EARL WARREN: confirmation as Chief Justice delayed almost two months in 1954. Warren's was a recess appointment, and the two months' period referred to does not include that part of the Court's term—October to January—during which Warren served as Chief Justice until the Senate reconvened. Harsher things were said about Warren than had been said during the battle over Brandeis. The leader of the fight against confirmation was Republican Senator Langer, of North Dakota, a senior member of the Judiciary Committee, who went so far as to impugn Warren's loyalty. This charge was never supported with evidence, and it was widely assumed that Langer's real motive was to try to secure the appointment for someone from his own state. Additional opposition to Warren, especially on the part of conservative Southern Democrats, came because of his alleged "left-wing" or "liberal" views.

JOHN MARSHALL HARLAN (Jr.): confirmation delayed for three months in 1955. Opposition to Harlan was based on his supposed sympathy to the cause of world government.

POTTER STEWART: confirmation delayed four months in 1959. Stewart's was a recess appointment, and the four months' period referred to does not include that part of the Court's term—October to January—during which Stewart served as Associate Justice until the Senate reconvened. The opposition to Stewart was not directed against the nominee. Rather, it was directed against the Court as a whole because of the Court's decisions in segregation, Communism and other civil rights cases. Stewart was a convenient "whipping-boy". The final vote was 70:17. It is significant to note that the opposition Senators were all from the South, *i.e.*, two each from Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia, and one from Florida.

In many cases more than one factor appears to have caused the delay in senatorial confirmation, although one factor may have been dominant. We found three principal causes for the occurrence of "unusual delays" in confirmation:

1. *Involvement with a political question* on which there is strong feeling on the part of the public, some senators, or pressure groups. Thus, Trimble was opposed by "state's rightists", Curtis by the abolitionists, Bradley by "hard money Easterners", Lamar by Northern Radical Republicans, McKenna by the antitrust and anti-railroad people, Pitney by labor, Brandeis by business interests and bigots, Harlan (Jr.) by anti-world government people, and Stewart was made a "whipping-boy" because of emotional reactions to the

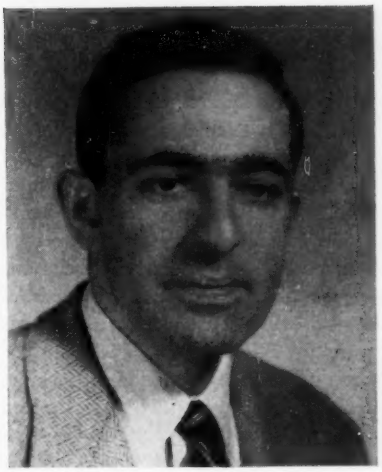

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Table IV

Occupations of Supreme Court Justices at Time of Appointment

Judge of State Court	20
Judge of Inferior Federal Court	19
Non-judicial and Non-legislative Federal Officer	18
Private Practice of Law	14
U. S. Senator	8
U. S. Representative	4
Member of State Cabinet	4
State Governor	3
Associate Justice promoted to Chief Justice	2
Professor of Law	2
Justice of the Permanent Court of International Justice	1

In general, the appointments from state office clustered toward the beginning of the Court's history, appointments from federal offices toward the end.

Many of the men appointed held a variety of state or federal offices or both prior to their appointments.

Court's decisions in segregation, communism, and other civil rights questions.

2. *Opposition to the appointing President*, manifesting itself in opposition to his nominee. The opposition to President Jackson's appointments of Taney and Barbour, is an example. More frequently, such opposition resulted in the rejection of the nominees or the failure of the Senate to act on the appointment. Other presidents whose nominees encountered opposition were John Quincy Adams, Johnson, Grant, Tyler and Fillmore. (*Cf.* rejections *infra*).

3. *Personal senatorial vendettas.* Thus, Jackson was delayed because of his feud with Senator Tydings. Warren was held up because Senator Langer wanted the appointment to go to someone from his own state. Senator Phelps opposed Fuller for the same reason, and Senators Howe and Christiancy opposed Harlan (Sr.) because they wanted the appointment for themselves. The early attempt to use senatorial courtesy by Senator Rowe of Trimble's home state failed, but see President Cleveland's experience below.

II. Declinations and Rejections

Men who were nominated or confirmed, or both, but never served, are a source of valuable information about aspects of the appointing process.

JOHN RUTLEDGE: served one term as Chief Justice under a recess appointment, was rejected by the Senate by a vote of 10:14. Rutledge had been one of the original Associate Justices of the Supreme Court. His qualifications were formidable, and he was a close personal friend of President Washington. However, after two years he had resigned from the Court to accept an appointment as Chief Justice of the Supreme Court of South Carolina. Four years later (1795), Washington gave him a recess appointment as Chief Justice of the United States. His appointment was rejected by the Senate because of a speech he had made in opposition to the Jay Treaty. The Federalists (of course, both Washington and Rutledge were Federalists, too) would not confirm the appointment of a man who had actively opposed the treaty which they supported so wholeheartedly. It was a strictly political fight, though not a partisan one.

WILLIAM CUSHING: nominated for promotion to Chief Justice by President Washington after the rejection of Rutledge, was confirmed by the Senate one day after the nomination. However, Cushing, the then senior Associate Justice on the Court, declined the promotion because of his age. He felt that at 64 he could not accept the added burden of being Chief.

JOHN JAY: nominated by President Adams on December 18, 1800, and confirmed the next day. The former United States Chief Justice and then Governor of New York claimed that the "arduous" duties of circuit riding made it inadvisable for him to accept the appointment because of his poor health. (Then 55 years old, Jay lived another twenty-nine years!) Actually, his main reason for declining the appointment was that he believed the Judiciary Act relegated the Supreme Court to an inferior governmental position of little importance. There is little doubt that Jay hoped to run for President or Vice President in the future.

LEVI LINCOLN: although Lincoln had notified President Madison of his desire not to be nominated, feeling was so strong in favor of Lincoln that Madison named him against his wishes, hoping that the esteemed Lincoln would change his mind. He was immediately confirmed, but the eminent attorney declined because of his advanced age (62) and defective eyesight.

ALEXANDER WOLCOTT: nominated by President Madison, Wolcott became the second man to be rejected by the Senate. The Federalists opposed him for political reasons, including his vigorous enforcement of the embargo and non-intercourse acts (as U. S. Collector of Customs) and his ultra-partisanship.

Table V

Religion of Supreme Court Justices at Time of Appointment

Unspecified Protestant	27
Episcopalian	22
Presbyterian	16
Unitarian	6
Roman Catholic	6
Baptist	5
Congregationalist	3
Methodist	3
Jewish	3
Disciples of Christ	2
Quaker	1
Unknown	1

A man of mediocre ability, there was no enthusiasm for his appointment within his own Republican-Democratic Party, as evidenced by the rejection vote of 9:24.

JOHN QUINCY ADAMS: nominated by President Madison on February 21, 1811, and confirmed by unanimous vote the next day. Adams declined stating that he knew too little law and that he was too politically partisan to sit on the Court. He had no intention of getting out of the political arena, and his presidential ambitions were, in fact, realized fourteen years later.

JOHN JORDAN CRITTENDEN: nominated by President John Quincy Adams, action on Crittenden's appointment was "postponed" by the Senate by a vote of 23:17 two months after the nomination. Opposition to this appointment was not directed against the candidate, but against the appointing President.

(Continued on page 219)

The Errant Motorist: Public Enemy No. 1

Pointing out that more Americans have been killed in automobile accidents during the last half century than in all wars in which the United States has fought, Judge Zeichner declares that the traffic violator is really our Public Enemy No. 1.

by Irving B. Zeichner • *Judge of the Atlantic Highlands Municipal Court (New Jersey)*

WHEN THE DEMORALIZING practice of ticket-fixing went the way of the horse and buggy in New Jersey, a policeman told the late Chief Justice Arthur T. Vanderbilt that for honest law officers the new uniform traffic ticket was "their Declaration of Independence and their Emancipation Proclamation". A somewhat different opinion was held by an unhappy police chief who publicly remarked, "It stinks."

The fact is that enforcement of traffic laws has not kept pace with advances in motor transportation. Half a century ago the Garden State enacted a motor vehicle law in answer to public demand that automobiles be banned from the highways as too dangerous. The Driver's Manual points out that things began to happen as soon as the automobile replaced the horse and drivers no longer had a horse to help do their thinking.

This mobile aggressor in our midst years ago recorded its one millionth fatality. Since the advent of the motor car, more American lives have been lost in automobile mishaps than in all the wars in which our country has engaged from the Revolutionary War down to and including the Korean conflict. The annual toll of 1,500,000 such accidents presents one of our great domestic problems.

Of the four major manifestations of crime confronting us today in this country, Justice Vanderbilt stated in a monograph of the Institute of Judicial Administration—treason in the form of subversive Communism, organized gang control of business and local government, juvenile delinquency and violations of traffic laws—violations of the traffic laws may seem at first blush the least important. Indeed, there are many who will be surprised to see such violations classified as crime. Yet, he pointed out, so harmful to society are the results of traffic law violations that no other classification is possible, regardless of what language may be used in the statutes.

This great jurist and legal scholar summed up the fearful havoc wrought by the motor age in a single paragraph:

> Transgressors of the traffic laws are not a class set apart like gangsters. The law-abiding citizen in a moment may turn into a traffic violator almost without intending to be such and may find the step to manslaughter on the highway even shorter than he imagines. Traffic law offenders, frequently the most flagrant offenders, have a way of turning up unexpectedly in the best regulated households, and many otherwise fair-minded people find it difficult to think of their own loved ones as criminals, even though the evidence of their wrongdoing is all too obvious. These possibilities, moreover, have a great tendency to make us all overly cautious in pressing for a rigorous enforcement of the traffic laws, manifest though the necessity therefor must be to every thoughtful citizen. We have a perfectly human tendency to shut our eyes to the enormity of the over-all problem of traffic law enforcement as reflected in the lives lost, the careers blasted, and homes disrupted, and the property destroyed by motorists and to seek to minimize the significance of the particular case in which we may be concerned. Whatever may be our point of view on legal contests between man and man in what we call the civil law, in the conflicts between the state and the individual that we know as the criminal law, the average defendant and his friends are much more likely to be seeking mercy rather than justice—and in this are they unlike the child seeking the solace of its mother or, for that matter, any of us as we approach the Great Throne on the final day of Judgment? These frailties of human nature, deep bred in most of us, do not make the enforcement of our traffic laws the easier.

More and More Cars— More and More Violations

As for statistics, an estimated thirty million of our fellow citizens—about a third of the nation's motorists—were cited to appear in traffic court last year for violations of quasi-criminal offenses. New York's Chief Magistrate John M. Murtagh reported that a summons was issued every thirty seconds for a traffic offense in the nation's largest city, and this was but a fraction of the violations. But, big city or small town, everywhere the traffic case load has mounted as year by year more and more cars roll onto car-saturated roads.

Few among this parade of what has been called "the biggest show on earth"

may be said to have accepted these summonses with enthusiasm and many may be said to have resented the enforcement of the law as applied to them. If these shameful statistics can be said to reflect some sort of social chaos, it is obvious that, as a people, we must, in the main, learn to police ourselves.

Every hour, according to a report of the American Bar Association's Traffic Court Program Committee, about $500,000 in property damage occurs through traffic accidents. It runs to nearly five billion dollars a year in economic loss —apart form the tragic toll of deaths and injuries. The major causes are bad highways, bad vehicles and bad drivers.

Who are the bad drivers? Psychiatrists say that angry, frustrated persons are most likely to get into trouble in traffic. Some get a sensation of power when behind the wheel and feel like supermen. Dr. Karl Menninger told the American Psychiatric Association that "Research into the driver himself, what makes him the way he is, on a long-term basis would be of great help. I believe the psychiatrists could come up with the answers to make driving safer."

At the same time, a study of driving habits presented to the American Psychological Association indicated that least responsibility among youthful drivers exists in the "red-blooded heman American boy" type. As for commercial drivers, experiments had shown the accident-prone to possess an "inability to consider other human beings and the social order, strong egocentric needs and poor intellectual control over emotional reaction".

Some responsible segments of American life have sought to counter motoring irresponsibility by the use of widely advertised slogans such as "The Life You Save May Be Your Own", hardly an inducement for the type of motorist who likes to adorn his automobile with fur pieces and similar useless appendages. Others have attacked the alcohol factor in highway homicide by way of temperance crusades. But if the public appears to be too callous to stem the tide of tragedy, it nevertheless clamors for a solution to a seemingly insoluble problem.

Why doesn't somebody do something? A great deal of money, along with blood, sweat and tears, has been spent in traffic safety research and education. The counterattack on the mobile aggressor in our midst is not a "crash program" but a ceaseless campaign conducted on many fronts by the police and other agencies.

Moreover, a welter of data has accumulated on every conceivable topic, from the shape and color of a traffic signal to field-of-vision tests, word association tests, motor co-ordination responses, glare reaction time and the prevalence of dexedrine usage without prescription by truck drivers. Reviewing this vast accumulation of literature, Dr. Maier D. Tuckler told a symposium on traffic accidents of the American Academy of Forensic Sciences that the basic question involves the personality of the man behind the wheel.

> The stable, reasonably mature individual with an adequate control of his emotions is recognized at his work, at his social relationships and within his family circle as competent and adequate. When this man takes the wheel of his car, his personality does not change. He is responsible for his behavior, he is calm, concerned for the welfare of his family and, obviously, for his own welfare, and he is considerate of the rights of others. "He drives as he lives."

If the best safety device is a good driver, one way to eliminate "driver failure" is by license control. L. S. Harris, Executive Director of the American Association of Motor Vehicle Administrators, offered this solution:

> It is generally agreed that an adequate driver license law properly administered and rigidly enforced is the most efficient and positive device available to public officials for traffic accident prevention... The average driver considers no privilege more necessary to his everyday life and pursuit of happiness than the privilege of operating his automobile. Under proper enforcement there is no privilege which he would go to greater lengths to protect and preserve... Records show that a very small percentage of drivers who have suffered one enforced suspension or revocation of license require similar treatment subsequently.

The Use of Radar— an Effective Check

To help weed out the "Can'ts", the "Don'ts" and the "Won'ts", one of the most effective weapons in the traffic police arsenal has proved to be the electromatic speedmeter. The old roadside admonition "Get a horse!" has now been replaced by "Speed Checked by Radar". In spite of an initial fear of "speed-traps", radar has, with minor exception, achieved general public acceptance because of its accuracy and reliability in calculating the speed at which a motor vehicle is moving.

All too often in the past, violators succeeded in raising technical objections at the trial to the calculation of speeds by the police. Studies have shown that speedometers vary about 10 per cent from true speed and that the variance widens with increasing speed. The type of tires and the amount of tire wear and inflation are some of the other factors which make a reading inaccurate. Radar has overcome most of these objections.

In *State* v. *Dantonio*, the Supreme Court of New Jersey became the first court of last resort to affirm a speeding conviction based on the use of radar. It held that readings based on this device constituted legally admissible evidence and would be accorded judicial recognition without the aid of expert testimony.

> While it is vital under our basic concepts of justice and due process that every individual accused of a speeding violation be afforded a fair hearing and be not adjudged guilty without evidence which convinces beyond reasonable doubt, it is equally vital that no unnecessary obstacles be placed in the way of the State's efforts to deal firmly and effectively with a public threat which has reached staggering proportions... In dealing with this as well as other law enforcement problems, enlightened officials properly avail themselves of scientific discoveries as soon as their reliability appears and modern courts of justice may not rightly lag far behind.

The Traffic Institute of Northwestern University commented that other such devices and processes in the traffic law enforcement field such as chemical tests for intoxication, scientific estima-

tion of minimum speed from skidmarks and stopping distances of vehicles under various conditions may now come in for broader recognition and acceptance by the courts. Such developments, it said, strengthen the arm of the traffic law enforcement agencies by facilitating the use of current scientific know-how in the detection and conviction of violators.

This view is less than unanimous. One position holds that police highway patrols are not meant to catch erring motorists but to deter them from erring. Its proponents aver that the new mechanical contrivances are creating a war of nerves between the authorities and the motorists in a kind of cat and mouse game. They further maintain that radar, like officers hiding behind bushes and in unmarked cars, is building up a traffic Gestapo.

The American Automobile Association believes that enforcement should be directed primarily toward preventing violations. To that end, it recommended that enforcement be carried out by uniformed policemen using vehicles which are painted, marked and lighted so as to result in ready recognition both day and night. It further urged that when radar or similar devices are used to detect speed violations there should be distinctive warning signs posted.

The contrasting view, of course, is that a motorist should not adjust his behavior to the presence of a recognizable police car. He should not feel that the game was played contrary to the rules when he is unexpectedly flagged down by an unmarked patrol. Indeed, it is not to be expected that there will be law observance only when an officer hovers in sight.

The increasing use of police road blocks for the mass checking of drivers and automobiles has been called to public attention by the press. The legality of such indiscriminate highway blockages for the purpose of discovering chance violations is openly questioned by the American Automobile Association. It stated that good intentions should not be allowed to obscure the inherent dangers to civil rights in inconveniencing multitudes of motorists who are innocent of any wrong-doing.

It comes as no surprise, therefore, that there are constitutional problems in the realm of motoring which are of deep concern to both the public and the police. In a single week, two New York City magistrates came to opposite conclusions in cases involving illegally parked cars. In one instance, a traffic judge dismissed a complaint against a motorist who elected to remain silent when the patrolman could not identify the owner of the car or state that he saw the defendant park it. A day or two later, another magistrate held that such a motorist had no right to refuse to testify because a parking violation does not come within the purview of the Fifth Amendment inasmuch as it is not a crime or a misdemeanor but an offense.

The Empire State was the scene of another legal contest of no little interest to law enforcement authorities. A vehicle was photographed by two cameras which had been set up by the police who computed the speed by the time which elapsed between the taking of the pictures. This was followed by a traffic bureau look-up of the photographed license number and resulted in a speeding charge being lodged against the owner of the car. He appealed his conviction on the ground that mere proof of ownership was not enough to support the presumption that he had been the driver.

The Court of Appeals, in a four-to-three decision, upset the lower court ruling and found that neither a presumption nor an inference of the driver's identity could arise from mere proof of ownership in a case involving a moving violation. It drew a distinction between this case and another New York decision which held that in prosecuting for parking violations there is a rebuttable presumption that the owner was the operator.

Trial judges know that motorists, as a class, do not intend to break the law. But, as the American Bar Association's Traffic Court Program has pointed out, motor vehicle laws are designed primarily to prohibit certain acts which experience teaches, and the legislature declares, to be unsafe and likely to result in accidents. These unsafe actions are illegal. Traffic laws thus require the motorist to do, or to refrain from doing, certain acts. Consequently what the motorist intended to do, or what he did not intend to do, at the time of violation, ordinarily has no bearing on his innocence or guilt.

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Judges may differ on many things but most agree that the problems brought on by the automobile are of such magnitude as to make the errant motorist the real Public Enemy No. 1. The traffic toll has become a kind of capital punishment which the public inflicts on itself because it ignores the ancient injunction that man should be as scrupulous about a minor infraction as about a grave offense.

With new concepts of time and distance, America's transmutation into a nation on wheels has had a devastating impact on traditional respect for the law. And as certain as death itself is the fact that, along with education and engineering, there is no safeguard against this new and deadly enemy of the people other than effective law enforcement and individual self-discipline.

The Solicitor General's Office and Administrative Agency Litigation

Mr. Stern discusses the work of the Office of the Solicitor General of the United States and his function in determining what cases shall be appealed by the Federal Government. He also explains the Solicitor General's relationship to the independent regulatory commissions which may wish to carry cases to the Supreme Court. This paper is based upon a talk before the Administrative Law Institute of the Administrative Law Section of the American Bar Association.

by **Robert L. Stern** • *of the Illinois Bar (Chicago)*

THE PRACTICES AND policies of the Solicitor General's Office in dealing with administrative agency cases are, with one or two differences, the same as in handling other cases. This paper will, therefore, consist mainly of a description of how the Office operates, with some reference to problems which concern the agencies particularly.

Congress has provided that there shall be an Attorney General who shall be the head of the Department of Justice,[1] and that there shall be a Solicitor General who shall be "learned in the law".[2] The Attorney General is the chief law officer of the Government, but he is primarily an administrator, policy maker and Presidential adviser.

The Solicitor General, on the other hand, may not unfairly be described as the highest Government official who acts primarily as a lawyer. He has few administrative responsibilities; he can devote his time to studying the legal problems which come before him. Moreover, he must stand on his own feet when he is presenting the most important Government cases to the Supreme Court.

The Solicitor General's staff of from seven to nine lawyers, two of whom act as First and Second Assistants, is almost always chosen on the basis of merit after a search within and without the Government for the best possible man who can be attracted, usually regardless of politics. Many have come from other parts of the Department of Justice or the Government where they have proved their competence in working with the Solicitor General's Office. Many have been Supreme Court law clerks who have been chosen by the Justices on the basis of their outstanding ability.

A High Standard and a High Esprit

In part because of the standard of selection and in part because of the job it has to do, the Office has had a high *esprit de corps* and a traditional standard of performance of "nothing but the best". This is recognized and respected by those both within and without the Government who deal with the Office, and the Supreme Court has come to expect it.

I will be speaking interchangeably of the Solicitor General and the Solicitor General's Office—really of the Solicitor General as an institution rather than as an individual. The Office, experience proves, molds the Solicitor General, who usually comes from an entirely different background from that of his staff, but almost invariably prides himself on conforming to the standards of the Office. The consequence is that the Office operates pretty much the same way no matter who is Solicitor General.

This does not mean that the Solicitor General merely rubber stamps what his staff recommends. Far from it, as would be obvious to anyone who knows the present Solicitor General, his immediate predecessors from Baltimore, or such distinguished earlier occupants of the Office as John W. Davis, William D. Mitchell, Charles E. Hughes, Jr., and Judges Reed, Jackson, Biddle and Fahy. The Solicitor General makes all important decisions himself. And his personality, of course, makes a difference. But he voluntarily adheres to the standards which the Office has long maintained.

1. Probably most of the time of the staff is spent reviewing briefs. All briefs, and this includes petitions for certiorari, jurisdictional statements in direct appeals, and briefs in opposition, are drafted originally by one of the other Divisions of the Department of Justice or one of the independent agencies such as the Labor Board, SEC, etc. There have been as many as 750 per year.[3] The briefs are then reviewed by one of the Solicitor General's lawyers, as well as by the First or Second Assistant, if one of them hasn't reviewed it in the first place. This review may result in anything from a complete rewriting of the brief, down to sending it to the printer without change, which is something the reviewer much prefers to do since it is

1. 5 U.S.C. §291.
2. 5 U.S.C. §293.
3. Statistics in this paper are taken from the Annual Report of the Solicitor General.

much easier. For most briefs the work lies between these two extremes, and consists of revisions and modifications often made in collaboration with the original writer.

Whether and to what extent the Solicitor General personally reviews the briefs varies with the individual. He will, of course, scrutinize the briefs in important cases and the cases he argues. Some Solicitors General have insisted on reading all the briefs before they go back for final printing. Others have relied on the staff to call their attention to the important ones or those which present special problems.

2. Although oral arguments get most of the publicity, as in any law office they take the least amount of time. The Government is a party or *amicus* in about 60 per cent of the cases argued in the Supreme Court, and thus participates in sixty-five to ninety-five arguments per year. The Solicitor General assigns all Government arguments in the Supreme Court. He argues a number of the most important cases himself and distributes the rest among members of his staff and the attorneys in the Divisions of the Department or the independent agencies from which the cases came. When an agency is autonomous, like the ICC, the Solicitor General and its General Counsel agree on assignments, which means that the cases are divided between the Commission and the Department of Justice, as they probably would have been anyhow. About one half are argued by lawyers outside the Solicitor General's Office. On the whole, the agencies argue a larger proportion of their own cases than do the Divisions of the Department.

3. A principal function of the Solicitor General's Office is to decide what cases the Government can appeal. The Solicitor General's duties in this respect are not limited to Supreme Court cases. Whenever, in cases handled by the Department of Justice, the Government loses and the case is appealable, a recommendation for or against appeal or certiorari to the intermediate court or the Supreme Court must be made to the Solicitor General. There can thus be no appeal to any court, or for that matter no decision not to appeal, without his approval.

Since the administrative agencies generally handle their own cases in the lower courts, their litigation comes to the attention of the Solicitor General only when it approaches the Supreme Court. When the agency has lost a case, it decides whether it wants to petition for certiorari, or, when appropriate, take a direct appeal. If it decides to go ahead, it requests the Solicitor General to authorize the petition for certiorari or the appeal. Except for a few agencies like the ICC, which operates under special statutes which I'll refer to later, no agency can take a case to the Supreme Court without the Solicitor General's authorization.

All of these recommendations for or against appeals and petitions for certiorari, whether from the Department of Justice or the agencies, are handled in the same way. The recommendation is reviewed by one of the lawyers on the Solicitor General's staff and also the First or Second Assistant, unless he reviews it in the first instance himself. They either note their approval on the recommendation or prepare their own memorandum for submission to the Solicitor General, who then makes the decision.

If there are differences of viewpoint or difficulties to be ironed out, conferences are held with the officials who have submitted the recommendation. Although the Solicitor General always carefully considers the views of the persons from whom the recommendations have come, he is more reluctant to overrule recommendations from the independent agencies than those from the Divisions of the Department. But the Solicitor General does not follow the agency recommendations if, in his best judgment as a lawyer, that would be clearly wrong.

The Standards for Granting Certiorari

Most cases go to the Supreme Court by way of certiorari. In determining whether to petition for certiorari the Solicitor General heeds the Supreme Court's frequent pronouncements, in its rules and elsewhere, that it will grant certiorari only when there is a conflict among the lower appellate courts, when the case is of general importance, or sometimes when there is gross error below—or perhaps when those factors are present in some combination. The Solicitor General attempts to apply the Supreme Court's standards. He will not take up every lower court decision which trial counsel in the Department, or the administrative agency, or the Solicitor General himself, believes to be wrong. Last term the Solicitor General petitioned for certiorari in thirty-two cases while the Government's opponents petitioned in 520.

The reasons underlying this traditional approach by the Solicitor General are partly self-serving and partly not.

The Solicitor General regards himself—and the Supreme Court regards him—not only as an officer of the Executive Branch but also as an officer of the Court. This is supposed to be true of all lawyers appearing before all courts, but the Solicitor General takes it seriously. As such he is aware of the necessity from the standpoint of the effective administration of the judicial system of restricting the number of cases taken to the Supreme Court to the number that Court can hear. This alone permits the Court to give adequate consideration to the important matters which the highest tribunal of the land should decide. That is the policy underlying the certiorari system which Congress and the Supreme Court found it necessary to establish to permit the Court to do its job.

A heavy additional burden would be imposed on the Court if the Government, with its great volume of litigation, disregarded that policy and acted like the normal litigant who wants to take one more shot at reversing a decision which is obviously wrong because he lost.

As Judge Thacher said, when he was speaking as Solicitor General before the American Law Institute in 1931[4]:

> This duty brings with it a peculiar responsibility to the Court, in taking infinite pains to see that the cases presented are only such as are worthy of its review.

4. Thacher, *Genesis and Present Duties of Office of Solicitor General*, 17 A.B.A.J. 519, 521 (1931).

The selfish reason for the Solicitor General's self-restraint in petitioning for certiorari is to give the Court confidence in Government petitions. It is hoped and believed—although no one who has not been on the Court can be sure—that the Court will realize that the Solicitor General will not assert that an issue is of general importance unless it is—and that confidence in the Solicitor General's attempt to adhere to the Court's own standards will cause the Court to grant more Government petitions.

Whatever the reason, from 50 per cent to 75 per cent of all Government petitions are granted, 67 per cent having been granted last term, as contrasted with no more than 10 per cent of other petitions.

The refusal of the Solicitor General to petition for certiorari provokes the most friction between his Office and the administrative agencies. I do not mean to suggest that disagreement is frequent or that there is conflict with all agencies. On the whole the agencies are aware of the Solicitor General's policies, as well as of the Supreme Court rules, and attempt to conform to them. Some agencies are so careful that there is seldom any difference of opinion.

But lawyers will not always agree on such matters, even lawyers representing the same client, and the Solicitor General and agency counsel do not always approach or evaluate a case in the same way. The latter also must follow the instructions of the agency itself.

Some of the agencies and their counsel—and I am sure that this is the case of other Department of Justice attorneys too—think that the Solicitor General holds too tight a rein in passing upon requests for certiorari. They believe that he acts too much as an adjunct of the Supreme Court and not enough as advocate for the United States or its agencies.[5] Not infrequently, and not entirely jocularly, they remind the members of his staff, if not the Solicitor General himself, that they are not members of the judiciary but are the part of the Executive Department which is supposed to act as lawyers for the remainder. On the other hand, I know that members of the Supreme Court frequently admonish a new Solicitor General not to be too liberal in authorizing certiorari.

A few agencies, by special statute, can take a case to the Supreme Court without permission from the Solicitor General. The Interstate Commerce Act makes the United States the principal defendant in suits to set aside ICC orders but allows the Commission to intervene separately and to appeal as a separate party.[6] Some of the statutory provisions relating to the FCC, the Maritime Board and the Secretary of Agriculture were modeled on the Interstate Commerce Act, so that they also do not need the Solicitor General's authorization.[7]

The cases from these agencies are nevertheless submitted to the Solicitor General's Office in order to induce the Solicitor General to join in the petition or appeal on behalf of the United States, and usually the Office and the agencies work together in entire harmony. In case of initial disagreement each tries to persuade the other, and usually an accord is reached. When this is not possible, the agency can go ahead on its own, and the Solicitor General either stays out of the case or presents his own views independently.

The agency's autonomy works both ways. The fact that it may proceed without the Solicitor General's approval means that he does not have the entire responsibility for seeing that the agency's position is presented to the Supreme Court. This makes it easier for the Solicitor General to adhere to his own views. Whether this is the reason why it is the ICC which most often appears with the Solicitor General in opposition or not in support is not clear, but it may be a contributing factor.

Which Side Shall He Support?

The Solicitor General is faced in a small number of cases with a problem which seldom confronts a private practitioner—which side of a case should he support.

1. In a number of situations there are conflicting Government interests. There have been quite a few cases in which the Department of Agriculture, on behalf of farmer-shippers, opposed an order of the Interstate Commerce Commission. There have been disagreements between the OPA and the ICC, between the Wage and Hour Division

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5. In this connection Judge Sobeloff stated when Solicitor General:

> The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory, but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts. [Sobeloff, *Attorney for the Government: The Work of the Solicitor Generals Office*, 41 A.B.A.J. 229 (1955).]

6. 28 U.S.C. §§2321-2325. It would seem more sensible for the agency to be the primary defendant, and for the Attorney General to have the right to intervene, since the agency is interested in all the cases and the Department of Justice in only a few. The present arrangement is the product of a history which need not be spelled out here. See H.R. Reps. 1619, 1620, 1621, 80th Cong., 2d Sess., especially "Additional Views".

7. 5 U.S.C. §§1031-1042, 64 Stat. 1129 (1950). In 1950 the statutory provisions for these agencies were revised so as to provide for review in courts of appeals instead of three-judge district courts and for going to the Supreme Court by certiorari instead of appeal. A similar proposal for the Interstate Commerce Commission failed to pass as a result of opposition by that Commission and its bar.

and the Army, between the Federal Reserve Board and the Treasury, between the ICC and the SEC, between the Secretary of the Interior and the FPC, between the Railroad Retirement Board and the Social Security Board, between the CAB and the Post Office, and even between the CAB and the CAA.[8]

These intragovernmental disagreements cannot be settled internally by the Department of Justice. Many involve the independent agencies which are not bound to accept the Attorney General's opinion. In most of the cases private parties, such as shippers or railroads, employers or employees, who are not bound by any governmental opinion, are in a position to take the issue to court.

The Solicitor General has an equal duty to represent each of the two competing Government interests or agencies. In such situations he will try to determine impartially which position he thinks is correct. If he agrees entirely with one side he will give it his support. Sometimes he takes an intermediate position, filing a separate brief of his own. Sometimes he stays out of a case and lets the agencies fight it out themselves. The Court is always apprised of the intragovernmental conflict, and I know of no case in which the Solicitor General has precluded an independent agency from presenting its position.

When one of the competing interests can be represented only by Department of Justice attorneys or when the interest is one enforced by the Department itself, it is somewhat more difficult for the Solicitor General to be completely neutral, and I am not sure that he is. As an example, in reparations cases the Civil Division of the Department of Justice alone can represent the Government as shipper against the railroads.[9]

In cases under the Fair Labor Standards Act by employees against Government cost-plus contractors, the Civil Division customarily represents the defendant, although the Department of Justice also has an obligation to see that the Fair Labor Standards Act is complied with. The Solicitor General has supported both the Wage and Hour Division and the Army in such cases.[10]

It has been said that the administrative agencies fare badly when opposed to the antitrust policies of the Department of Justice itself. I believe there may be something to this, though perhaps more because of the instincts of the Solicitor General's Office than by design. But this occurs most often when the agency, like the ICC or Maritime Board, has authority to appear separately on its own behalf.

For example, in the recent *Isbrandtsen* case,[11] the Solicitor General opposed a Maritime Board order which sustained a rate structure discriminating against shippers who would not give all their business to a combination of shipping companies, thus upholding the antitrust viewpoint against that of the Maritime Board. I was in that litigation at an earlier stage, and I know the Solicitor General's Office then thought the Maritime Board's position wrong as a matter of law.

But the Solicitor General does not invariably support the Antitrust Division. In a recent Antitrust Division case involving trademark rights in imported perfume, he confessed error on the Antitrust Division, when its position conflicted with that of the Treasury Department.[12]

2. This leads to the second type of unusual problem confronting a Solicitor General. Whatever position the Government has taken in the lower courts, he will not support a contention which he believes completely untenable, even if he has to confess error. One of the reasons why the Solicitor General confesses error, instead of acting as the completely enthusiastic—and one-sided—advocate, is to keep his own and the Government's credit high in the Supreme Court. The more important reason is that as chief law officer of the United States in the Supreme Court he feels it is his duty to adhere to the law when he thinks a case can rightly be decided only one way[13]—even though this may not be the way Government counsel argued in the court below. This doesn't happen often, of course. I don't want to encourage my brethren of the private Bar to become optimistic that they can convince the Solicitor General to confess error whenever they have lost to the Government in the lower courts.

If the Government has lost below, the Solicitor General can avoid taking a position he thinks is wrong by refusing permission to take the case higher. But sometimes the Government has won, and the Solicitor General will not even hear of the case until the other party has taken it to the Supreme Court. Most of these cases do not involve the administrative agencies, but have been handled through the lower courts by the United States Attorneys, who lack the time and facilities for legal research which a case receives when it reaches the Department of Justice in Washington for consideration at the Supreme Court level.

In one such case[14] a sailor was refused entry to the United States on the ground that he had committed a crime within five years of the attempted entry. There was no question that he was coming in from Cuba, but the only reason he was in Cuba was that his American ship had been torpedoed en route from California to New York. Although the lower court had literally applied the statute, the Solicitor General thought this too raw and conceded that in such circumstances a sailor should not be deemed to have left the United States.

Occasionally an administrative agency is involved. If the Solicitor General is convinced that its position cannot be supported, he will normally authorize it to represent itself, and may or may not take an affirmative position in opposition.

An example is the well-known *Standard of Indiana* case[15] under the Robinson Patman Act. When that case first reached the Supreme Court in 1950,

8. See Stern, *"Inconsistency" in Government Litigation*, 64 HARV. L. REV. 759 (1951).
9. As in *United States* v. *Interstate Commerce Commission*, 337 U. S. 427 (1949).
10. *Bay Ridge Operating Co.* v. *Aaron*, 334 U. S. 446 (1948); *Powell* v. *United States Cartridge Co.*, 339 U. S. 497 (1950).
11. *Federal Maritime Board* v. *Isbrandtsen*, 356 U. S. 481 (1948).
12. In 1931 Solicitor General Thacher stated that: "... a tradition has grown to regard the interests of the Government as best served by an attitude toward litigation of absolute candor and fair dealing, which will not tolerate injustice whether the result be favorable or unfavorable to the United States." *Loc. cit. supra*, Note 4.
13. *Guerlain* v. *United States*, 115 F. Supp. 77 (S.D. N.Y.), reversed 358 U. S. 915 (1958).
14. *Delgadillo* v. *Carmichael*, 332 U. S. 388 (1947).
15. *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231 (1950).

the Solicitor General's Office thought the Federal Trade Commission wrong in holding that meeting the price of a competitor was not a defense. Prior to that time the head of the Antitrust Division had stated to a congressional committee that the Department of Justice disagreed with the Commission on the question in issue. The Solicitor General's staff made its own independent analysis before coming to the same conclusion. The Solicitor General authorized the Commission to handle the case in the Court on its own but filed nothing himself.

Another example was a case decided in 1950[16] which involved a provision in the Interstate Commerce Act requiring the Commission to protect employees against displacement for four years following the effective date of a Commission's order authorizing a consolidation of terminal facilities. In the particular case, it was known that the construction of the new New Orleans terminal would take five years, so that many employees would not lose their jobs until five years after the effective date of the order. The Commission held that it lacked authority to extend the employees protection beyond four years from the approval of the consolidation, although according protection during this period would have been meaningless. The Solicitor General was convinced that the Commission's literal construction of the Act was absurd and contrary to its purposes. Even though the Department of Justice had supported the Commission in the lower courts, he opposed the Commission in the Supreme Court. The Commission presented the argument in support of its own position, but unsuccessfully.

Whether or not error should be confessed or an agency not supported usually does not present a simple problem. The Solicitor General is aware that to confess error will not only infuriate the attorneys who have handled the case for the Government below, but also the judges who were persuaded to decide in the Government's favor. It is very embarrassing to meet these judges shortly after one has confessed error on them in the Supreme Court.

Thus, the Solicitor General must do considerable soul-searching before he reverses the Government's position. It cannot be enough that he thinks the Government may lose on appeal. He must believe that there is no respectable argument on the Government's side. There have been cases in which the Solicitor General's Office almost confessed error which the Government subsequently won in the Supreme Court, and this, of course, emphasizes the need for humility. Nevertheless, so far as I know, every Solicitor General for years—I am told at least since 1890—has been willing to concede that the Government was wrong when he was convinced of that fact.

You may ask what is gained by the intervention of the Solicitor General's Office into litigation which has been handled by other Government lawyers in the lower courts. Many of those lawyers in the Department and the agencies have asked the same question, and perhaps I did myself when I was in the Antitrust Division writing briefs for the Solicitor General's Office.

I think it is generally recognized, even by the lawyers for the agencies, that the Government benefits in four ways, which are interrelated.

(1) In the first place the quality of briefs and often of arguments is greatly improved. This does not result from the fact that the lawyers on the Solicitor General's staff are necessarily more skilled than the persons whose work they are reviewing. Often they are—but sometimes they are not. As I have indicated, the reputation of the Office and the nature of its work enables the Solicitor General to attract very capable lawyers.

But even as between lawyers of equal competence the review in the Solicitor General's Office customarily improves the product. In part this is because any fresh mind is likely to have a fresh viewpoint. Two minds are better than one—and this is true irrespective of which does the drafting and which the reviewing. I know that whenever I wrote a brief *de novo* in the Solicitor General's Office, and that was sometimes done, I would send it to the appropriate division for review and improvement.

(2) The reviewer in the Solicitor General's Office is, however, more than merely a fresh mind. The nature of his job, as compared to that of the specialists who have drafted the brief he reviews, gives him a broader perspective and greater objectivity. He specializes in the Supreme Court, not in a particular subject. He is far enough from the trial of the case to be able to see its significance as a whole. He is better able than the lawyer who works only in one field to guess how a judge who is also not a specialist will react to a case, and to frame the presentation, written or oral, accordingly.

I remember reviewing a tax brief which started out by talking about Section 103(B)(1)(X), or something like that, as if every person of sound mind must have known what that was since the third grade—or at least the third year of law school. Specialists often cannot appreciate what other persons, even other lawyers—and perhaps even Supreme Court Justices—don't know.

A former General Counsel of an agency stated that he was sure that its "written presentations to the Supreme Court gained greatly in the course of processing by the Solicitor General's Office". In that connection, he said: "I believe that review by lawyers not having detailed familiarity with the law administered by particular agencies is more likely to be helpful than review by an agency alumnus who happens to be in the Solicitor General's Office".

(3) The third way in which the Solicitor General's Office affects the handling of litigation is through the attempt to comply with the Supreme Court's standards, to which I have already referred. This serves to keep the Government's credit high in the Court, and also is helpful to the public interest in the administration of justice, which the Solicitor General believes it is part of his function to serve.

(4) The fourth basis for centralizing control of Government Supreme Court litigation in the Solicitor General's Office is the need for coordination. For the Government to take different posi-

(Continued on page 217)

16. *Railway Labor Executives Association* v. *United States*, 339 U. S. 142 (1950).

Judicial Reform Is No Sport for the Short Winded

Mr. Nims reminds us of the very serious increase of crime in America; of the indifference of lawyers, judges and laymen to this and to court improvement; of the meddling of politicians in the work of the courts; of the attack now being made on our basic concepts of law and of the resulting responsibility of the Bar in the immediate future. The phrase in the title, "No Sport for the Short Winded", is taken from "Brief for a Better Court System", by Arthur T. Vanderbilt in the May 5, 1957, issue of the *New York Times Magazine.*

by Harry D. Nims • *of the New York Bar (New York City)*

I should see the garden far better; said Alice to herself, if I could get to the top of that hill; and here's a path . . . but how curiously it twists!
Through the Looking-Glass, by Lewis Carroll

ENGLAND TOOK one hundred years (1770-1873) to modernize its courts; in New York attempts at judicial reform have been going on for over 125 years and the job is still far from complete; twenty years were required to put through Congress a Bill authorizing the Supreme Court of the United States to make better Rules for the Federal District Courts.

Why is law reform so difficult?

Almost any lawyer, and many laymen, can give a glib answer. Most of them probably would ascribe it to the traditional opposition of lawyers to change; to their inflexibility and self-satisfaction; to politics and to public indifference.

They might point out that opposition to change has existed for centuries and refer to Niccolo Machiavelli (1469-1527) an important man in his day, who wrote: "There is nothing more difficult to carry out, nor more doubtful of success, nor more dangerous to handle, than to initiate a new order of things." That was written four hundred years ago.

There is a considerable body of writing dealing with opposition to change. It seems to be almost a human trait.[1] It has been a hallmark of lawyers and judges for generations. In 1906, Colonel Wigmore characterized their attitude as "universal complacent torpidity".

The difficulty with law reform may be due, in part, to the feeling of many laymen, consciously or unconsciously, that there is not very much which they can do about the mysterious processes of the courts; and that those who have the necessary knowledge do not or will not act.

This attitude is normal. People are discouraged about the administration of justice, and with good reason. Almost every day we read in papers or hear over TV or radio, stories of murders and other crimes. But we seldom are told whether the offenders are caught; or how many of those that are caught, are punished. We may be told that certain crimes "have been cleared by arrest". Most people think that that is the end of the matter. It is not. It means little. It is merely a beginning. Offenders, despite their arrest, may go free. Crimes may never be solved. Those convicted may never be punished; and if they are, in most instances, we are not told about it. Nobody seems interested enough to give the public the facts. As a result, most people accept the situation regretfully—convinced that court reform is an insoluble problem.

The Federal Bureau of Investigation pointed out in 1958 that crime is increasing four times as fast as the population. Arrests of persons under 18 have increased 55 per cent since 1952. In 1220 cities reporting, 10 per cent of all arrests for murder, negligent manslaughter, rape, and 53 per cent of arrests for larceny (other than auto) have been of youths under 18 years old.[2]

In a recent statement former President Hoover reminds us that the Bill of Rights guarantees to all of us the right to be secure in our person. Yet, last year, 6,920 of us lost their lives by manslaughter and 5,740 by negligent manslaughter. There were 21,080 instances of rape; 61,410 instances of robbery; 100,110 instances of aggravated assault, making a total of 195,260 known instances in which our security was violated.[3]

Crime in the United States increased 9.3 per cent in 1958. A murder occurred every 64.2 minutes; a forcible rape every 36.1 minutes; a robbery every 7 minutes, a car was stolen every 1.9 minutes; a burglary was committed every 46.4 seconds. Forcible rape increased 13 per cent; robbery 12 per

1. *Society and Medical Progress*, Bernard F. Stern. Princeton University Press 1941. By same author RESISTANCE TO THE ADOPTION OF TECHNOLOGICAL INNOVATIONS. National Resources Committee, U. S. Government Printing Office 1937, pages 36-66.
2. *Uniform Crime Reports for the United States*. April 23. 1958. pages 69-70.
3. *Do We Have a Duty to Get Tough?* READER'S DIGEST, September. 1959, page 143.

cent; burglary 12 per cent; a crime was committed every 20.3 seconds.[4]

The blame for these conditions does not rest solely on the perpetrators of the crimes. It must be shared by those of us who countenance a lax administration of justice.

There is grave doubt as to how efficient justice the Bar or the public really want. There seems to be a limit to improvement in this field just as, in large cities, there is a limit to the extent to which some laws are enforced. More effective enforcement might hurt business and that would be bad politics.

The Courts Are in Political Hands

In the main, the personnel and methods of American courts are in political hands. Many thoughtful people know this, but they are not sufficiently interested to do much about it.

Few realize what a valuable asset to politicians [the "wire pullers" as Lord Bryce called them in 1880 and the "Patronage boys" as the *New York Herald Tribune* termed them (February 19, 1959)] is this control of the courts, in terms of power and money. In this category may be placed those, great or small, who put their own interest and that of their political party ahead of the interest of the public, in matters pertaining to the courts. Again and again, this influence has blocked completely efforts for improvement.

The advantages from this control are indicated by the number of courts. In nineteen states taken at random there are about 5,400 courts. There are 625 in New York alone. All have judges and other officers in whom the politicians can and do take interest and from whom they can and do solicit cash contributions. Such things are not talked about very much, nor are the contributions which candidates for judicial office make.

But law reform has not been neglected. Legislatures have created commissions; amended codes; appropriated vast sums of money (in New York about $1,000,000 in the last five years [1953-58]); private foundations and other interested groups have made princely gifts; committees have been organized; conventions held; extensive surveys and studies have been conducted, sometimes lasting for years; judicial councils have done likewise; conferences have deliberated. All these and more have been tried, and for the most part have accomplished very little.

Something seems always to be lacking.

The influence of the Bar has declined. Some law schools have encouraged students to follow the philosophy of the pocketbook rather than of justice for all.

John Adams, as a young man, incurred the hatred of his neighbors by defending the British soldiers who had a part in the Boston Massacre. He got them acquitted.

It is hard to imagine a young man on the legal staff of an insurance company or of a great law office, or in a government job being allowed to do any such thing as this today; or to come out openly and work for law reform. Many lawyers today, so far as working for law reform is concerned, are not their own masters.

For all this the Bar is paying a price. The number of practicing lawyers has declined. The number of law school students in the last ten years has dropped 20 per cent. Fewer young people are choosing the law as a career. Many of those who do, do not become practicing lawyers but take salaried positions.

The percentage of the national income spent for legal services has dwindled to about one third of what it was twenty-five years ago, despite expansion of business and population and multiplication of problems in which lawyers can be useful.[5]

From 1929 to 1951, the general increase in industrial earnings was 131 per cent; lawyers' income increased 58 per cent; physicians' 157 per cent and dentists' 83 per cent. In 1934-51 the average lawyer doubled his income while that of the physician was fourfold. In 1954 the average net income, before taxes, of one third of all practicing lawyers was less than $5,485 while their overhead has been steadily increasing.[6]

Respect for the Bar is not increased when one sees on TV lawyers guiding and advising gangsters and hoodlums appearing as witnesses, who are so immersed in crime that the giving of their name, their age or their residence, or other casual facts about themselves may, as they assert, incriminate them.

And the Bar is not doing very much about it.

In almost his last writing, Judge Vanderbilt put the question thus: "But the task we are now contemplating is of far greater magnitude than any undertaken in the past by the legal profession of any common-law country."

Then he asked: "To whom shall we turn for help? What instrumentalities have we available for this tremendous task?"[7]

The most vital fact of American life today is not our wealth or the development of satellites. It is that our rights and privileges have been assured to us because we live under law.

Until very recently, that security was menaced only by our own carelessness and neglect of it. There seemed always to be plenty of time for law reform.

Today, however, powerful forces are feverishly at work in the world, determined to destroy life under law and substitute for it, particularly in America, their own philosophy.

Here, then, is judicial reform in a new setting.

Here is a challenge to all judges and lawyers individually, not merely to bar associations, whether our profession will play its part in combating this assault on life under law.

We of the Bar can easily dodge this responsibility if we wish. What we do is up to us. No one can dictate to us. But the consequences of a failure may be suffered by many besides ourselves. We, not the politicians, are the responsible custodians of the instrumentalities of justice, the essential element of our life if we are to continue as a free people.

But we say we have been getting on pretty well for years. What's the hurry

4. Washington Associated Press, September 2, 1959.

5. THE 1958 LAWYER AND HIS 1939 DOLLAR (page 5). Prepared by the Special Committee on Economics of Law Practice for the American Bar Association—Printed as a Public Service by West Publishing Company.

6. See pamphlet of Association's *Lawyers' Economic Problems and Some Bar Association Solutions* (1958) pages 1, 2, 5. Printed as a Public Service Bancroft-Whitney Company... The Lawyers Co-operative Publishing Company.

7. THE CHALLENGE OF LAW REFORM (1955 Arthur T. Vanderbilt, page 145.

now? Let's take our time and for the most part we are doing just that.

Former Governor Adlai Stevenson was in Russia recently, for several months. The Russians, he says, believe that their methods, their aspirations and their dreams

> . . . make up the final truth about the nature of man and society . . . that no effort, no dedication, no sacrifice is too great that may help to realize the Communist party's goals in Soviet society . . . that no corner of humanity can be a matter of indifference to the Communist state, because the whole human race is destined to become in time one communist brotherhood . . . They are worldwide, and there is no corner of the earth's surface which they think too insignificant for their attention . . . the important thing is that the Soviet Russians believe in their truth, as the men of the Western world once believed in theirs. They, not we, are firing the shots that are heard around the world . . . their tempo is dynamic and rapid, ours sluggish . . .
>
> Complacency made us impervious to ideas, even the obvious idea that we are in danger . . . And between a chaotic, selfish, indifferent, commercial society and the iron discipline of the communist world, I would not like to predict the outcome.[8]

Recently, Governor Stevenson said this also:

> The next ten years, I would guess, will really prove whether this nation or any nation so conceived and so dedicated can long endure—and right now the prognosis is not good . . .
>
> In our fat, dumb and happy fashion, we assume that we can't lose—that if we stand firm, persevere and damn the Communists enough, right will surely prevail in the end.[9]

On March 13, 1959, President Eisenhower in a message to Congress said:

> This battle is now joined. The next decade will forecast its outcome . . . It is not the goal of the American people that the United States should be the richest nation in the graveyard of history.[10]

A few weeks later, Mr. Hoover, Director of the Federal Bureau of Investigation said: "Our present society has substituted indulgence for discipline, pleasure for duty and money for morals."[11]

On February 9, 1959, an editorial in *Life* said: "a deeper and more fearful concern has been stirring some of the most responsible U. S. leaders. Their worry: are Americans undereducated, overentertained, tossing easefully but restlessly in what Reinhold Niebuhr calls a state of 'sophisticated vulgarity'."

This attack is aimed straight at law as the basis of our rights. To meet that threat no group is as vitally affected or carries as great a responsibility as the Bar. Nothing can be more important in meeting this threat than that we show our people, and the world, that a democracy like ours, can be administered efficiently under law.

But the time is short.

What part will we of the Bar play in these coming ten years?

Fortunately there is some evidence that we are beginning to try to meet this challenge. Lawyers and bar associations have been making more effort than before to improve the situation.

The membership of the American Bar Association has jumped in fifty years from 3,716 in 1909 to over 96,000 in 1959.

Several states are trying to overhaul their courts. This is going on in California, Illinois, New York, Wisconsin, Connecticut, Massachusetts, Pennsylvania, Kansas and elsewhere. Some have failed. Others have completed important changes.

The organized Bar is using new methods to arouse public interest in law and in the courts. In 1958 and 1959, May 1 was observed as "Law Day, U.S.A." The purpose is to impress the public with the importance of law.

These measures and others like them increase public understanding of our legal system. But they do not remedy many of the court methods of which the public has complained so long.

Common sense seems to dictate that only a legal Pearl Harbor can change this impasse very much because the profession, as a whole, by reason of its traditions and habits which lie deep, seems more difficult to influence than any other group except possibly the Vermont farmers.

We know well enough what we need.

As Chief Justice Horace Stern, of Pennsylvania, has pointed out, we need forms of justice that are so simple and so human that people unlearned in legal procedure can readily understand them.

We need judges not selected by politicians.

We need less complicated court systems and less complicated procedure.

We need a definite reduction of delay.

We need a far more efficient control of crime.

We need a determination to reform in a majority of the Bench and Bar.

For years there have been reasonable and practical methods of obtaining these objectives if we, as a profession, had wanted them. But we continue to

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8. *The Political Relevance of Moral Principle*—Adlai E. Stevenson.
9. The New York Times Magazine—March 1, 1959.
10. The New York Times, March 14, 1959.
11. New York Mirror, April 6, 1951.

quarrel about what should be done and how to do it.

Former Justice Joseph M. Proskauer (New York) in his autobiography, *A Segment of My Times*, wrote five sentences which cannot be repeated too often (page 149):

> Now to what does all this lead? Scholars have written and bar associations have passed resolutions on law reform. We have had research and investigation until the truth is as clear as the noonday sun.
>
> I emphasize, however, that the letter killeth and that the spirit giveth life. We need a will to reform.

A distinguished physician once told the writer that although there are various remedies for alcoholism, his profession has found that they are valueless unless the patient is absolutely determined to stop drinking, completely and permanently.

Perhaps our progress has been slow because we have lacked the one thing absolutely essential, if improvement is to come, *i.e.*, determination to make the necessary changes work.

There are illustrations of this.

Pretrial is described in an official report to the Senate Appropriations Committee of a field study of twenty-three United States District Courts "as the greatest single advance of modern times in the handling of the business of the courts".[12]

It was first used systematically in the United States over thirty years ago. Its value was quickly demonstrated but its adoption has been slow. There are still a good many judges and lawyers who do not use it; or if they do use it, do so in a lukewarm, half-hearted fashion. They lack determination to make it work.

About thirty-seven years ago, Congress became concerned at the conditions in the United States courts. In 1922, it created the "Judicial Conference of the United States" made up of the Senior Judges of the various Circuits. It was to meet once a year to discuss the work of these courts and make recommendations for improvement (September 14, 1922).

But in the next seventeen years not much change resulted and in 1939, Congress created an Administrative Office of the U. S. Courts and in each Circuit a "Judicial Council", made up of the chief judge and the Circuit Judges of the circuit.

The statute (Section 332 Title 28 U. S. Code) provides that:

> The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit, in active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.
>
> The council shall be known as the judicial council of the circuit.
>
> The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts. The council shall take such action thereon as may be necessary.
>
> Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

This statute was mandatory but page 79 of this report of 1959 to the Senate Appropriations Committee states that "inadequate administrative control and direction have seriously impaired the system's effectiveness and many of its operations have been wasteful of appropriated funds. The judiciary, although provided by Congress with self-governing administrative machinery, has been slow and seemingly reluctant in putting into effect controls imposed by law and in facing realities as to the needs of present-day court administration."

Also, at page 81 the report said: "The failure of the judiciary to carry out many of the functions relating to administrative direction and control appeared to be, at least in part, directly responsible for some rather disturbing conditions found to exist."

Here again a will and determination to make this system effective have been lacking.

We Americans live in a country which the rest of the world regards as the outstanding example of democracy. Whether we like it or not, this carries with it grave responsibilities. Whether we like it or not, much of the responsibility rests on the Bench and Bar.

Washington and Lincoln and others have told us that justice and its administration are of paramount importance in a democracy. But we have not paid much attention to this fact. So we have stumbled along, the politicians leading us. Nobody seems to have cared very much about the slow pace. Why get excited? Are not things in fairly good shape?

During these years litigants have waited for five to ten years for justice. Often those who have won their cases have gotten relief only at excessive expense. Obtaining justice in the courts has been a dreary, delayed and costly commodity. Crime has increased and become safer.

But suppose the wheels do creak. Only a few people, comparatively, are hurt. To make changes means trouble and work. After all, we have the best government in the world. Why worry?

That was all very well up to a few years ago; but as we have seen, today we are confronted by a theory of government, accepted by millions, which is the antithesis of our own; and which is advocated by a great nation which is determined to replace our theories of law and life with its own.

Perhaps, in this crisis, some of us will recall a statement which Woodrow Wilson made to his students at Wesleyan, in 1889:

> Democratic institutions are never done. They are, like the living tissue, always a-making. It is a strenuous thing this business of living the life of a free people, and we cannot escape the burden of our inheritance.

Mr. Wilson may have gotten this thought from a statement of Goethe: "What you have inherited from your fathers, earn over again for yourselves or it will not be yours."

What practical measures can a busy judge or lawyer take if he has a will to do his part?

(Continued on page 216)

12. *Field Study of the Operations of United States Courts—Report to Senate Appropriations Committee* (April, 1959).

The Arena of the Giants: Rockingham County, New Hampshire

In the first quarter of the nineteenth century, Rockingham County, New Hampshire, in the southeastern corner of the state, possessed some of the finest lawyers ever to argue before the Bar. Mr. Reid, himself a lawyer from Strafford County, describes the legal prowess of the giants who practiced law in those early days, including their appearance together, like the finale of a great drama, in the celebrated *Dartmouth College* case.

by John Reid • *of the New Hampshire Bar (Dover)*

Consider who they were that fixed the standard of talent at the New Hampshire bar in the first quarter of the nineteenth century. There were giants in the land in those days.
—Robert Rantoul, Jr.

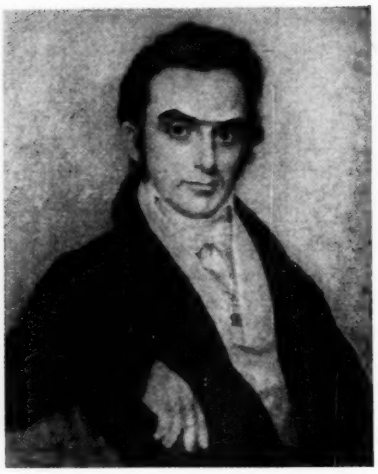
THERE HAVE BEEN many celebrated rural Bars in America, but it is doubtful if any ever surpassed the Olympian band of advocates who practiced in New Hampshire's Rockingham County during the opening decades of the nineteenth century. The Virginia lawyers who gathered in the one tavern town of Richmond after the close of the Revolutionary War were truly a galaxy of distinguished men: Randolph, Wickham, Innes, Ronald, Campbell, Pendleton and Carrington. But these names are remembered today chiefly because they sharpened the untrained mind of a legal neophyte named John Marshall. The same may be said for the lawyers whom Lemuel Shaw joined after he finished his legal studies in New Hampshire and first started to practice in Massachusetts: Dexter, Sullivan, Prescott, Webster, Curtis and Fletcher. Professor Beale of Harvard was undoubtedly right when he remarked that they were "perhaps as great lawyers as ever met in a single small city in this country". Yet it should not be forgotten that two of their number, Webster and Fletcher, received their baptism of fire at New Hampshire's Rockingham County Bar.

Daniel Webster often recalled with awe the years he had spent arguing cases at that Bar. He told Rufus Choate that he never met abler men than the lawyers who had initiated him "in the rugged discipline of the New Hampshire courts". On another occasion he remarked that he had practiced law, commencing before old Justice Jackman in Boscawen, who received his commission from George II, all the way up to John Marshall in Washington, and had never found any place where the law was administered with so much precision and exactness as in Rockingham County, New Hampshire.

Rockingham County during the early days of the nineteenth century was the center of New Hampshire's commercial, political and intellectual life. Embracing the old Yankee settlements along the jutting coast line from the Piscataqua to Seabrook, and extending beyond the Scotch-Irish country around Londonderry and Chester to the state capital at Concord, it was served by two courthouses located in the "half-shire towns" of Exeter and Portsmouth. And because the number of great lawyers was so large and the number of important cases so small, the trials that were conducted in them were often more than contests, they were tournaments. Sometimes there were two or three attorneys on each side. One of these might well be the six-times governor of the state, William Plumer. An untrained genius with a daedal mind, Plumer was New Hampshire's only true Jeffersonian. Like his friend Jeremy Bentham he distrusted oaths and never took one, making affirmations instead, a peculiarity that did not trouble the orthodox, God-fearing people of New Hampshire, who rather admired his obstinate individualism. In 1820 he was the only member of the electoral college to vote against Monroe, an action partly explained by his convictions and partly by his eccentric stubbornness. As a correspondent of Jefferson, Bentham and a half dozen of the day's leading figures he had a reputation that extended far beyond the physical limits of the world he lived in. At another time or place he might have been regarded as a splendid lawyer, yet so majestic were his rivals at the Bar that, to his Rockingham neighbors, he seemed a second-rate attorney practicing among titans.

George Sullivan— A Great Orator

It might be said that the salience of the Rockingham County Bar began in 1797 when Jeremiah Smith and Jeremiah Mason moved to southern New Hampshire and began to try cases in Exeter, a town that previously had been the private bailiwick of George Sullivan. He was the son of General John Sullivan, the state's Revolutionary War hero, and heir to all the Sullivan name meant to New Hampshire people. He was very much inferior to Smith and



Daniel Webster

Mason in legal scholarship, but not even Webster could equal his power to sway juries. He was the most accomplished orator ever to practice law in New Hampshire and this was both his strength and his undoing. As the legal historian, John Shirley, observed, "He relied too little on his preparation, and too much upon his oratory, his power of illustration and argument. But neither the court, the jury, nor the people ever grew weary of listening to his silver tones or his arguments, that fell like music on the ear." The courthouse was crowded whenever Sullivan appeared, for it was a pleasure to hear the rich resonance of his voice as the sentences came rolling out with their full, regular and sonorous cadences.

Sullivan's extraordinary eloquence and charm along with his father's name gave him such a hold on the people's imagination that he was the only arch-Federalist whom Isaac Hill, the Republican "Director" of the state, was never able to discredit. He had been an anti-Madison congressman during the opening days of the War of 1812 and had supported the aims and spirit of the Hartford Convention. Such a record would have been enough to ruin the professional as well as public career of other lawyers during the patriotic reaction which followed Jackson's victory at New Orleans. When greater men like Webster, Mason, Smith and Ichabod Bartlett would be voted out of office and would even quit the state in disgust, Sullivan remained New Hampshire's Attorney General for twenty-one years, well into the heyday of Hill's reign. Yet despite his popularity and his unusually high sense of professional and personal honor, Sullivan was regarded by his contemporaries as only a great advocate, not a great lawyer.

Jeremiah Smith, on the other hand, had a highly cultivated legal mind. He may even have been a legal genius. He had a remarkable record of public service and when Webster was asked to compose the epitaph on his tombstone he had difficulty finding a large enough monument:

Here Rest the Remains of
JEREMIAH SMITH
in Early Youth,
A Volunteer in the Cause of the
Revolution,
And Wounded at the Battle of
Bennington;
Afterwards,
A Representative in Congress by the
Choice of the People of
New Hampshire,
And an Able and Efficient Supporter
of the Measures of
WASHINGTON:
A District Attorney of the United States,
and Judge of the Circuit Court, by the
Appointment of Washington's Successor;
In Years Yet More Mature,
Governor of New Hampshire,
and
Twice Its Chief Justice.

His two terms as Chief Justice were his most notable contribution in public life for it was he who rescued New Hampshire from the shifting "common sense" jurisprudence expounded in the days when farmers and physicians constituted the judiciary and reinstated the common law. He was criticized for substituting *stare decisis* for equity, but he brought to the law the certainty it needed in an expanding commercial society. As a legal philosophizer only Charles Doe equalled him in the entire history of the state. Yet for all his learning he was a master of the wisecrack in a day when wit was a valuable courtroom weapon. A typical example of his dry, Yankee humor occurred during an Exeter town meeting when someone suggested building a fence around the burying ground where the epitaph which Webster composed now stands. "What is the need, Mr. Moderator," he asked, "of a new fence about such a place? Those who are outside of it have no desire to get in, and those who are inside cannot get out." He had a high originality and true genius in his humor throughout which ran a rare vein of satire and raillery always sprightly and amusing although sometimes quite offensive. In this respect he differed from Jeremiah Mason, who, though often humorous, was never offensive.

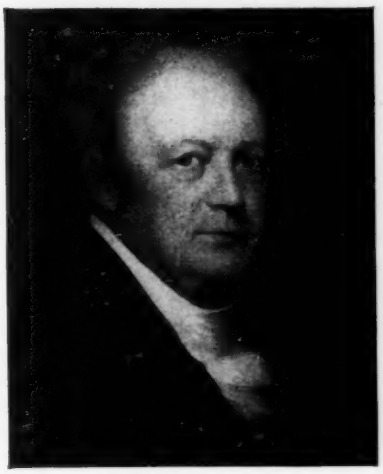
The inimitable Mason was the central figure in the group of lawyers who immortalized the Rockingham County Bar. He had no peer. Six foot six, of powerful frame and striking features, he was one of those extremely rare individuals who became living legends before middle age and retain their reputations throughout their lives. He had no interest except the law and shunned public office. He served less than one term in the United States Senate, resigning his seat to hasten back to his practice. Cool, wary, and devoted to his client, he had, in legal acumen and power of reasoning, no equal at the Bar or on the Bench. He has often been called America's greatest common law lawyer, and probably he was. His approach in every trial was original, fresh and suggestive. Webster claimed he would rather have met all the other attorneys he ever argued against combined in one case than meet Mason alone and single handed. "Mr. Mason", he said, "always put me up to all that I knew."

Mason did not have a good speaking voice or a graceful manner. He made no pretense towards oratory and sneered at all appearances of feeling or emotion as mere affectations unsuited for a court of law. It has been said the jury was not so much persuaded as compelled to go along with him, so irresistible was the force with which he focussed attention on the conclusion he sought, "—a conclusion which the hearer felt, long before it was reached, that he could, by no possibility, avoid, or stop short of, or turn aside from".

In direct contrast to Sullivan, Mason despised eloquence, addressing juries without rhetoric, polish, or artificiality of manner, bearing down always on the real issues. If he had any weak point this may have been it, because

at times he was too cautious and refined, and his distinctions would become too minute. Yet he had a remarkable way with juries which can be partly explained, as John Chipman Gray has pointed out, by "a knowledge of human nature amounting almost to genius". He would associate himself with rural jurors by affecting country speech, a tactic that has sometimes proved disastrous to lesser men. The only passion he seemed to feel was contempt, especially towards paid testimony. Once approaching a particularly damaging professional witness dressed in Quaker garb, he asked "Where did you get those clothes?" The man was so shaken by Mason's scorn he admitted that they had been furnished him for the trial. Yet Mason's terrible power of sarcasm was not, as Webster pointed out, "frothy or petulant, but cool and vitriolic", and it was in this respect his humor differed from Smith's. For with his trenchant wit and brusque manner, Mason had a style peculiarly his own, growing out of the severely practical turn of mind, which shunned all affectation.

Jeremiah Smith



Jeremiah Mason

The Epic Battles of the Two Jeremiahs

Whenever Jeremiah Mason met Jeremiah Smith in court the people always anticipated shrewd, witty, often rough retorts during the course of the trial. Their battles were epics, although, when it came to the pure art of wisecracking, the acrid humor of Ichabod Bartlett, the "Little Giant", frequently outdid them both. He was one of the youngest and shrewdest of the great Rockingham County lawyers, and while in Congress earned a nationwide reputation along with the nickname—"The Randolph of the North". Tradition has it he nearly fought a duel with Henry Clay. The incident occurred on January 24, 1824, during the debate on Webster's Greek resolution. Bartlett opposed the motion and Clay is said to have attempted to fasten a quarrel on him, but the New Hampshire Yankee retorted so effectively that Clay realized he would have to send the challenge if one were to pass between them. That night Clay called on Arthur Livermore, a former justice of the New Hampshire Superior Court then serving his third term in Congress, to inquire about Bartlett's courage. Livermore told him Bartlett would fight to the last gasp of life. Clay also asked Plumer if Bartlett would accept a challenge. Plumer said he knew one way Clay could find out.

"How?" Clay wondered.

"Ask him", Plumer replied. Ira Perley, who later became one of New Hampshire's greatest jurists and who didn't care for Plumer or his "Benthamism", used to say that this was the smartest thing Plumer ever uttered.

Someone sounded out Bartlett. "Tell him if he wants to fight", Bartlett, who was a bachelor, replied, "it will be across a four-foot table,—I have no crying children to leave behind me." The next day Clay was in a conciliatory mood.

Bartlett had a reputation for employing the choicest and fittest phrases to put across his point. Although not an orator like Sullivan, it was his fashion, when he wished to place particular emphasis upon a word, of hesitating an instant before pronouncing it. One lawyer said he was "*poising* his word before he launched it". A small, buoyant man, he was physically the opposite of the elephantine Mason. He gave all his energy to the law and his brilliant flashes of wit, keen sarcasm, and pungent irony often added life and spirit to the logical congruity of dry juridical discussion.

He was full of mischief. It was seldom that he was outjested, but whenever it happened it was sure to become a New Hampshire legend. Once he offered an affidavit during a trial and Mason, who was opposing counsel, began to comment on it with a good deal of severity. Hoping to soften the strictures Bartlett announced that the affiant was reported to be dead. Mason stood silent for a moment, and appeared to be so deeply moved that Bartlett, fearing he had carried the joke too far, added "But there is some report to suppose that it is a mistake."

"Thank God for that!" Mason responded, "The man who gave that affidavit ought to have time for repentance."

Such an occurrence was rare however, for, though Bartlett was not so great a lawyer as Mason, he could torment him with unmerciful thrusts. One day Mason was so annoyed he could stand it no longer, and glaring down at him said contemptuously, "Why, I could put you in my vest pocket."

"Then you'd have more law in your pocket than you have in your head," Bartlett shot back.

After Mason had been practicing for a short while in Portsmouth he began to hear rumors of a wonderfully clever country attorney from Boscawen said to be "as black as the ace of spades". The rumors persisted and Mason became quite eager to meet the new lawyer, especially when Jeremiah Smith returned from trial term in Hillsborough County to report that he had never before met such a young man as

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this. One day Mason was in Exeter to defend a client accused of forgery. Attorney General Atkinson, suffering from one of his frequent hangovers, failed to appear and the judge was about to dismiss the indictment when a young stranger arose in the back of the courtroom and asked permission to argue the government's case. Mason anticipated little difficulty and was inclined to relax at first, but so brilliant was the newcomer's presentation of the state's evidence that he soon found himself forced to exert all his efforts before he won an acquittal.

"He broke upon me", Mason later recalled, "like a thundershower in July, sudden, portentous, sweeping all before it." And thus began the most epic rivalry in the legal history of New England, if not of all America: Jeremiah Mason versus Daniel Webster. Long after they had left the scene, well into the twentieth century, the question as to who was the greater was hotly debated by lawyers in hotel rooms and courthouses from Hartford to Bangor. Few accepted the compromise offered by one attorney who suggested that "Mr. Mason was a great lawyer; but Mr. Webster was a great man practicing law." Someone tried to settle the argument while the two were still active in New Hampshire and after a trial term in which Webster and Mason had regularly opposed each other, asked a juror who was the greater lawyer.

"Oh, Mr. Webster is much the greatest."

"And yet Mr. Mason's clients won all the verdicts."

"Oh, that was because Mr. Mason always happened to be on the right side."

A much more competent observer was the venerable Supreme Court Justice, Joseph Story. There were few things Judge Story enjoyed more than holding court in Rockingham County and he freely expressed his delight with what he called "the vast law learning, and the prodigious intellectual power of the New Hampshire Bar". It may be he considered Mason the greater. At the 1812 term of the United States Circuit Court held at Portsmouth, Story vested Jeremiah Smith and Jeremiah Mason with the "honorable degree of sergeant-at-law", while he bestowed the lesser title of barrister-at-law upon George Sullivan and Daniel Webster. Mason, on the other hand, treated his two friends with impartiality. In a closet of his Portsmouth home he always kept two pairs of slippers, a red pair for Webster and a green pair for Story.

Brown v. Bramble
Webster Faces Mason

Mason and Webster opposed each other in many legal contests. One of the most memorable had a distinctly Dickensian flavor. The name itself, *Brown* v. *Bramble*, could easily have come from *The Pickwick Papers*. It developed out of a transaction quite common throughout rural New Hampshire in the days before social security. Brown, too old to work, conveyed his farm to Bramble in return for a life-lease or bond by which Bramble guaranteed to pay him one hundred dollars annually until he died. After a while Bramble became disturbed at Brown's tendency for longevity. He sought to cancel the bond for a definite sum, but since it was his only means of support Brown refused. It was Bramble's custom to endorse annual payments on the reverse side of the bond. At the next payment he wrote, not one hundred dollars, but one thousand dollars, adding "in full consideration of and cancelling this bond". Brown, unable to read or write, made his mark thinking he was merely acknowledging the usual payment. The following year when he sought his money Bramble refused to pay him. Brown first went to Mason for help, but finding him retained by Bramble, turned to Webster. The trial was held at Exeter and Webster, believing Brown's story, tended to feel quite confident until he heard that Bramble had a witness to testify to the fact of "settlement". He was a man named Lovejoy, a *chronic* or professional witness who appeared in nearly every case held in the neighborhood. Just before Lovejoy testified Webster noticed he was studying a paper. On the stand he told a plausible story, relating how he had been present and had heard the terms of settlement. Webster observed that the language of his testimony was rather artificial, employing legal jargon like "the *said* plaintiff" or "the *said* defendant". Webster decided he would have to gamble if he were to save his client's case. "There sat Mason", he related, "full of assurance, and for a moment I hesitated. Now, I thought, I will make a spoon or spoil a horn. I took the pen from behind my ear, drew myself up, and marched outside the box to the witness-stand. 'Sir', I exclaimed to Lovejoy, 'give me the paper from which you are testifying.' In an instant he pulled it out of his pocket; but before he had it quite out he hesitated and attempted to put it back. I seized it in triumph. There was his testimony in Bramble's handwriting." It was after this that men began calling Webster a magician.

One reason Webster's bold stroke proved so successful was the license permitted lawyers in cross examination. They were given the widest possible latitude. The rationale for this was the necessity of breaking down professional witnesses like Lovejoy, yet it was an evil that plagued the New Hampshire

(Continued on page 214)

Labor's Great Mistake:

The Struggle for the Toil State

Mr. Kelso declares that it is a mistake to assume that full employment is a desirable condition of society. Labor, he explains, is no longer the only source of economic wealth, since modern technology makes it possible to produce many goods and services primarily by the use of capital. What is needed, he suggests, is not full employment, but participation in production by all, which in the case of the owner of capital would mean leisure instead of employment. To achieve this, he says, we need an economic system that will make a rapidly growing number of capitalists possible.

by Louis O. Kelso • ***of the California Bar (San Francisco)***

"THE CONGRESS HEREBY declares that it is the continuing policy and responsibility of the Federal Government to use all practicable means . . . to promote maximum employment, production, and purchasing power." So runs the text of one of the most important policy determinations ever made by Congress—the Employment Act of 1946. The intent of the law, explained the Conference Committee, is that "Causes of unemployment are to be removed or eliminated".

The "all practicable means" referred to in the act and used since World War II to maintain full employment are mainly the pump-priming schemes advocated by John Maynard Keynes. Keynes saw that it was necessary only to place *sufficient* purchasing power in the hands of those most likely to spend it and all workers will be employed in producing goods and services. Faithfully following the Keynes theory and the policy of the Employment Act of 1946 during the thirteen years since the end of the war, we have force-injected hundreds of billions of dollars of purchasing power into our economy in order to provide *toil for all.*

Some of these billions were pumped in as various kinds of consumer debts which governmental policy encouraged: Easy construction mortgage credit, easy consumer durable goods credit, advance borrowings by business (interest free) against future taxes in the form of the rapid amortization program.

Other billions of governmentally created purchasing power took the form of lavish defense expenditures—expenditures that would not have been so recklessly made if it were not for the fact that however useless they might be, they do create purchasing power and promote full employment. When these expenditures carried our war potential to the point where we could erase any enemy from the face of the earth (and the Russians can do the same for us), their usefulness for full employment did not decrease. In spite of the problem which the military strategists call "overkilling", *i.e.*, being equipped to devastate people who already have been devastated, we continue to increase defense expenditures on the theory that ever more massive striking power is the *only deterrent* and, even if it isn't, building it creates full employment!

Other billions of government-created purchasing power have taken the form of direct governmental redistribution of income. Personal incomes and business incomes are taxed on a steeply graduated scale to give purchasing power to farmers, to elderly persons, to the unemployed.

Still more billions of purchasing power are created through international charity, called foreign aid. The use of charity—not charity as a Christian's act of mercy and compassion, but charity as a principle of income distribution to compensate for inherent injustices and inadequacies of the economic system—is, as we would expect if we analyzed it, a source of shame and a cause of hatred among men. To borrow capital on reasonable business terms in order to become self-supporting in an age where wealth is produced mainly by capital is consistent with mutual self-respect. But this is not true of charity in such cases. The historical record shows that what is true as between individuals is equally true as between nations: International charity is a source of mutual resentment, shame and hatred. But, since a large part of foreign aid is spent on machinery, equipment and food produced in the United States and on technical services rendered by Americans, full employment is promoted. So the spending goes on, and the deficits, the national debt and the international tensions all grow.

With all this, and a great deal more omitted here for brevity, the purchasing power pumped into the economy in the past thirteen peacetime years from time to time has been insufficient. During 1958 and early 1959, we had a recession in progress for many months. Unemployment hovered around five mil-

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lion, or higher. A super-pump-priming group, the Conference on Economic Progress, spearheaded a program to double, triple, and in some cases multiply by ten our deficit financing, our private borrowing, our foreign aid, our defense expenditures—whatever is necessary to create full, even over-full, employment. One benefit claimed for these proposals is that *more people will enter the labor market!*

We are late—dangerously late—in raising the question of whether full employment is a desirable economic goal. To be sure, the objection has been raised that the full-employment policy is inflationary, that inflation alone is redistributing billions of dollars of wealth annually, and that the brunt of the injury falls on those with fixed incomes from government bonds, insurance policies, pensions, savings accounts, and the like. And *the objection is well-founded.* Relentless and accelerating inflation must result from seeking full employment, unless we are willing to see economic freedom destroyed through government price and production controls and through the universal dole—probably in the form of permanent and universal unemployment compensation.

But, grave as the alternatives of disastrous inflation on the one hand or socialism on the other are, the question of whether full employment is a desirable economic goal for an advanced industrial society is a still more profound one. I believe that full employment is a false goal for labor because it must eventually rob the worker of precisely what he seeks in a free industrial economy:

> The greatest possible freedom from grinding toil,
>
> Personal economic security and independence,
>
> The opportunity to obtain an adequate distributive share of the wealth produced as the direct result of his making a contribution towards production, and not through a mere welfare or charitable share,
>
> The security of having *property rights*, rights established and protected by law, in his means of contributing to production: Property in his labor power (ability to work) and in wealth-producing capital instruments.

How Is Wealth Produced?

The fallacy of the full-employment policy lies in our unthinkingly assuming something that Karl Marx relied upon as the cornerstone of socialism: That wealth is produced only by labor. The truth is that in the American economy, wealth is produced primarily by capital, and the very purpose of technological change—improvements in the methods of production—is either to eliminate labor, or to render its employment unnecessary.

Our economic thinking has failed to keep pace with changes in the methods by which we carry on production. We have looked upon the industrial revolution as an improvement in tools which *make men more efficient producers of wealth.* This is a way of describing industrialization which can only be used where private property, either in men's labor power, or in capital, is not legally recognized or protected. To say that the addition of a locomotive and rails improves the productivity of the train crew in transporting goods (for otherwise they would have to haul the goods on their backs), is to disregard the question of who owns the labor power and who owns the capital instruments. To treat the railroad capital equipment as the tools of the railroad workers is to presume that the workers own the capital—which they almost invariably do not.

Nor does it affect the argument to point out that the train could not haul goods without the crew, for it is equally true that the crew could *never* transport the goods without the train. Indeed, the most important changes today in technology are those making possible the production of forms of wealth primarily through capital instruments that could never have been produced at all by labor alone: Aluminum, structural steel, artificial industrial diamonds, jet plane transportation, television transmission, etc.

While the productivity of capital instruments has been rising spectacularly, the productivity of men has been, by comparison, declining strikingly. The object of technological advance is not to create employment, but to destroy it! In every branch of production, the trend of technical change is towards greater output by capital instruments and less by labor. Even in the white collar fields where we have been able to absorb much of the disemployment in recent years, the automation revolution is now laying the groundwork for spectacular labor-saving innovations.

Industrialization has not merely taken the toil out of many kinds of labor; it has taken the production out of them, too.

Because of our failure to develop a theory of capitalist production of wealth which is consistent with our desire for a high general standard of living and our political objective of a free society, we find ourselves in the almost depraved state of trying artificially to puff up production, not to obtain more goods and services, *but for the sake of creating employment.*

Dispelling the Myths About How Wealth Is Produced

No industrial society will ever free itself from the necessity of using great quantities of human toil in order to produce wealth. The quality and quantity of the goods and services turned out will ever depend upon the integrity,

diligence, skill and intelligence of that labor (including managerial labor) as well as upon the quantity and quality of capital instruments. But in the United States of today, those necessary quantities of human toil fall far short of full employment—perhaps ten million jobs short, perhaps more. And if we are not so unwise as to destroy technological advance with our economic ignorance, the gulf between the actual demand for labor and a condition of full employment will broaden steadily and indefinitely into the future. The only possibilities that might interrupt the *normal* increasing of unemployment would be the stalemating of technological advance through a combination of industrial and labor monopolies, or the destruction of our great capital equipment through atomic war.

The solution to our problem lies not in the attempt either by organized labor or by economists or by politicians to pretend that there are more actual jobs than in fact there are. It lies in recognizing that some of our wealth is produced by labor, and much—an increasing portion—is produced by capital. Our salvation lies in our recognizing that wealth is produced in the ways in which it is in fact produced, and not in the ways in which a pre-industrial economic theory assumes that it is produced.

Not Full Employment, But Full Participation in Production

There is no need to question the common sense and common conscience that each household should produce wealth commensurate with its income. Elementary justice lies in the receipt of a distributive share from the proceeds of production equal to the contribution which a household makes towards production.

If an increasing share of the wealth is produced by capital and a decreasing share is produced by labor, then the legitimate objective of workers and of their unions should be to make certain that as the burden of production shifts from labor to capital, the number of households who participate in production through their individual ownership of capital shall *increase* in proportion, and the extent of dependence upon ownership of labor shall *decrease* in proportion. As the task of producing wealth is increasingly assumed by capital, the unemployment must be shifted from those dependent entirely on their labor to those dependent upon substantial capital estates for their participation in production. For these latter "unemployment" is a blessing, not a curse, enabling them to engage in the limitless other creative activities of civilization that lie outside the sphere of mere wealth-getting.

For us to maintain that our prosperity depends upon full employment is to repudiate the triumph of men's intelligence over their age-old economic problem of producing sufficient subsistence.

Needless to say, our prosperity, our political freedom and our well-being all depend upon *all* households participating in the production of wealth if they are to participate in its distribution. But let that participation be real; let it be in fact proportionate to the incomes that result from production, and let us not falsely overvalue labor as a substitute for revising our pre-industrial economic theories. As more of the wealth is produced by capital, more of our families must participate in production as owners of capital. A capitalist society requires a growing number of capitalists, not just growth in the estates of those who for generations have been capitalists. The goal of labor should not be toil for all, but *participation in production for all.* And the method of participation should not be dictated by the historical fact that once labor was the only productive force. It should be dictated by the technology of today. Our economic system, as a man-made institution, should adapt itself to make a rapidly growing number of capitalists possible.

When we are freed from the necessity of calling things labor which do not involve production (*i.e.*, featherbedding and other forms of artificially induced or pretended productive labor), and from the necessity of bloating consumption with artificially infused purchasing power merely to make toil for which there is no genuine need in our economy, we can again speak of the dignity of workers actually performing necessary work, of the pleasure of excellence, of the honorableness of service, and of the inspiration of creativeness.

The abandonment of the goal of full employment, and the setting of the goal of full participation in the production of wealth, either through the ownership and exercise of labor or the ownership and wise husbanding of capital, as the state of technological change dictates, is, I am sure, the one possibility open to us to avoid the collectivization of our economy, and the disappearance of freedom from our society.

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How Many Lawyers?

In an article in the September, 1959, issue of the AMERICAN BAR ASSOCIATION JOURNAL Reginald Heber Smith, under the title "The Bar Is Not Overcrowded", propounds the question as to whether there are too many or too few lawyers in the United States and concludes that the answer cannot be given until there are more statistical data available. The tables accompanying the articles disclose that in thirty states the number of admissions to the Bar has declined in the past two years and in eight states the number has increased. In some of these eight states, such as Florida and Texas, one would expect an increase because of their phenomenal growth and legal opportunities. The number of lawyers for each million of population has decreased.

No measuring rod has been suggested as a means for determining whether there are too many or too few lawyers. Should there be X lawyers for every Y million of people? Should the number of lawyers be limited so that each lawyer will net Z dollars? Actuarial statistics may be of assistance in helping to establish the needs of the population for medical, surgical and dental care. But the imponderables of human nature are so great that it is doubtful if there can ever be established satisfactorily a measuring rod to determine the needs of the people for legal assistance.

There are many factors which enter into the problem, making it difficult to give any factual answer. Not too many years ago the lawyer rode the circuit with his green bag filled with papers and books attached to his saddle. Real estate litigation in an expanding country took much of the early practitioner's time. Damage suits were few and far between. Of tax litigation there was practically none. His most lucrative practice was the administration of the estates of his friends and clients. Declarations with their many common law counts were written in longhand. Industrialization changed all of this. Title companies have taken over the title work; banks and trust companies reap the executors' commissions; and workmen's compensation laws solve the damage litigation of industry. Offsetting this loss of practice, there has been a great increase in automobile damage cases, in corporate law, in tax litigation and in practice involving the innumerable state and federal agencies and commissions. Every hamlet has its lawyer; practice has become largely localized, and to an increasing extent specialized. The modern machinery of a modern law office has vastly increased legal production varying, of course, with the brains and industry of the users. Leather-bound books have given way to loose-leaf services as a quick source for the answers to legal problems. The standard law school courses on contracts, real estate and torts have been supplemented by dozens of special courses varying from mineral to space law. The scene changes so rapidly that today's yardstick for measuring legal needs, if one can be devised, may be worthless a few years from now.

Other professions, especially the medical, began to look more attractive to the young people emerging from high school ready to decide which way to cast their lots for success and fortune in a strongly competitive world where no longer a shingle announcing that Joe Dokes is an attorney at law guarantees a lucrative or even a living practice.

In making a choice of his profession, the high school graduate who is considering the law as his vocation is now faced with many problems about which he knows little or which he does not understand. This may account for the mortality in law schools and even among graduate lawyers; it may well account in part for the reduction in the number of persons who embark on the study of law although most of the law schools are turning away applicants. The admission requirements are based on school standing and certain aptitude tests probably aided occasionally by the fact that the parent is an alumnus. If a larger number of those entering graduated and remained in the law, the number of lawyers entering the profession would undoubtedly increase even though the percentage of lawyers to total population did not keep up with population growth.

This brings up the question of the adequacy of the screening process applied by the law schools to the applicants. Is scholastic standing and aptitude alone sufficient? Is the applicant taking to the law because his father or some relative was a lawyer, because he believes it is a way to a fast buck with small capital investment, because he

(Continued on page 198)

Things Are Seldom What They Seem: The Jolly Little Wards of the Admiralty

Mr. Lovitt discusses the favored legal position of the seaman as a "ward of the admiralty". Whatever may have been the justification for treating sailors as incompetents a century ago, he says, there is certainly no reason for maintaining the fiction now, when members of the crews of ships are highly paid, often highly educated men.

by John V. Lovitt • *of the Pennsylvania Bar (Philadelphia)*

"WELL, YOU KNOW—" said Mr. Solly. "I mean *officially* we *are*. Crazy, I mean. We are officially designated by the gov'm'nt of the United States to be officially *in*sane."

Davy asked, "What do you mean?"

"Well," Mr. Solly said, "back in the olden days, when seafaring was really rough—you know, before the unions and all—they figured that a man that went to sea was nuts. I mean, if he wasn't plain *in*sane, he wouldn't never of gone. So they made ever seaman a ward of the United States gov'm'nt."

"Can you beat that? Now, I niver knew that," Blades said.

"Look it up and you'll see," said Mr. Solly. "It holds sway to this very hour, jist like we was a maniac, or orphan, or somethin'."

"Well, I niver—in all my twenty-seven years at sea—I never knew that," marvelled Blades.[1]

Mr. Solly is right and we share Blades' amazement when highly trained navigators, engineers, chefs and musicians afloat are accorded the seaman's status. I mean *in*sane or something. In *Harden* v. *Gordon* (Fed. Cas. No. 6047, C.C. Me. 1823), Justice Story described the seaman as "thoughtless", "credulous", "easily overreached" and "requiring indulgence". He said, "They are emphatically the wards of the admiralty, and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs dealing with their expectancies, wards with their guardian and *cestuis que trustent* with their trustees—".

Story, of course, was thinking of a "seaman" as one who could reef a sail aloft or steer a course, but the courts have extended the term to include practically the vessel's entire personnel—thus the chief engineer who holds degrees from M.I.T., the head chef and entertainers on a luxury liner are all "*in*sane" when they step into a court of admiralty.

Here are some of our jolly ward's privileges and protections:

He may sue in the federal courts without prepayment of costs or entering security (28 U.S.C.A. §1916). Nobody else can do this in any court.

Although today he receives high wages, if any part of his wages are withheld without sufficient cause, he can recover double pay for everyday the proper wage is withheld (46 U.S. C.A. §596). His brother on land has no such remedy.

He is the beneficiary of legislation prescribing minimum space for living quarters, subsistence and other matters pertaining to his comfort and security. Legislation has not been so solicitous of the land worker.

If ill, he is cared for by the U. S. Public Health Service, a privilege not extended to those who toil ashore.

If he is injured while a member of the crew, he is entitled to maintenance and cure for which his employer and his vessel are liable without fault even though he received his injury while engaged in a frolic of his own on shore leave. His recovery is not limited as is the case under Workmen's Compensation. But this is not all. He may also sue in admiralty for "full indemnity" if the "unseaworthiness" of his vessel contributed to his injury and he will recover even if his employer was without fault. Furthermore, "unseaworthiness" is not what one might surmise. It is not only a leaking vessel or hazardous equipment. The courts have been extremely liberal in construing the term and have extended the concept to include a case where one member of the crew injured another in a drunken brawl, piously ruling that the hiring of a vicious sailor made the vessel unseaworthy in spite of the fact that the sailor was supplied by the union and his employer had no real choice in the selection (*Boudoin* v. *Lykes Bros.*, 348 U. S. 336, 1955 A.M.C. 488).

In such an action the measure of damages is the same as in a personal injury case on land, *but* the seaman's case is not barred by his contributory negligence as is the case generally on land. The seaman's contributory negligence merely reduces the amount of recovery.

1. Apologies to *The New Yorker*.

But again this is not all. He may also get a jury trial under the Jones Act (46 U.S.C. §688) in a suit against his employer grounded on negligence where the defenses of "assumption of risk" and "fellow servant" are abolished and again contributory negligence merely mitigates the amount of damages. The courts have so blended the distinction between "negligence", "unseaworthiness" and negligence causing unseaworthiness, that it is probably fair to say that an action under this act may be supported by "unseaworthiness" alone with all its advantages to the seaman.[2] Thus, the seaman has in effect something better than Workmen's Compensation in "maintenance and cure" and something better than an ordinary tort action and best of all he has them both. He eats his cake and has it too. Such a rich dish is denied to the landlubber.

Speaking of this happy situation, Judge Bailey Aldrich (U.S.D.C. Mass.) at a dinner of the Maritime Law Association, aptly and humorously referring to his training as an admiralty judge said, "All that he [the judge] has to learn, as you know, is to send every seaman's case to the jury. There was a time when I thought that somewhere there might be an exception. Suppose the plaintiff was so grossly contributorily negligent, and the ship so free of negligence, that it must be said that the injury was due solely to the plaintiff's own fault. Naturally, I figured a majority of the Supreme Court would find an answer to this, but it troubled me for a while to think what it could be. The inspiration finally came, and I stated it in a footnote to an opinion last spring. If a seaman is as negligent as all that, manifestly it makes the ship unseaworthy to have him aboard. Nor, in this happy situation, would contributory negligence of the seaman reduce damages, for the greater his negligence, the more was the ship unseaworthy. It's very simple, once you think of it."

When Is a Release Not a Release?

Passing from tort to contract, one is again amazed at the leniency of the courts toward seamen's releases. This is illustrated by *Waters* v. *U. S.*, 191 F. 2d 212, 1951 A.M.C. 1975. There a chief engineer, well educated and earning over $1,000 a month, was injured. He settled his claim for maintenance and cure for a substantial amount with the claims agent of the ship owner and gave a full release. Waters knew what he was signing. Later Waters became dissatisfied with the amount of the settlement. The court on the theory that Waters was its credulous ward invalidated the release and permitted him to sue, because the claims agent had not pointed out to Waters that he might also have a claim for damages.

On land, of course, Waters would be held to his release. Most illuminating on this difference is *Garrett* v. *Moore-McCormack*, 317 U. S. 239, 1942 A.M.C. 1645. Here an injured seaman sued in the Pennsylvania State Court for maintenance and cure and also damages under the Jones Act (he had a right to sue in the state court under the "Savings to Suitors" clause of the Judiciary Act). The defendant proved that plaintiff had given it a full release for $100. Plaintiff replied that he had executed the release under the influence of drugs. The jury awarded plaintiff $4,000. The Court below entered judgment n.o.v. on the ground that plaintiff had not sustained the burden of showing by "clear, precise and indubitable" evidence that the release was void, and the Supreme Court of Pennsylvania affirmed. The Supreme Court of the United States took the case and applying the wardship theory of the admiralty reversed. Said the Court: "The burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion and that it was made by the seaman with full understanding of his rights. The adequacy of the consideration and the nature of the medical and legal advice available to the seaman at the time of signing the release are relevant to an appraisal of his understanding."

Thus, the burden of proof with respect to seamen's releases is the precise opposite to the case when a release is given by any other competent adult, be the seaman ever so competent in fact.

In this connection, *United States* v. *Johnson*, 160 F. 2d 789, 1947 A.M.C. 765, is a rather remarkable case. A seaman was treated by the U. S. Public Health Service and upon his discharge he told the shipowner's claims agent he had fully recovered, settled his claim and gave a general release. It later developed that the effect of his injuries lasted longer than expected. The court invalidated the release because Johnson had been misled, unintentionally of course, by the medical advice he received from the Public Health Service. Note that the medical advice was not that of the shipowner or his agent and it was not claimed that anything done on behalf of the shipowner misled or influenced Johnson nor was it suggested that Johnson was not fully competent and aware of what he was doing when he signed the release.

One is prompted to ask, what, if anything, can a shipowner do to make certain that his release is good when he settles a seaman's claim. Must he insist that the seaman hire a doctor or a lawyer before taking a release? If the seaman refuses to hire such professional advice, should the shipowner hire them? If this were done, it surely would not tax the court's ingenuity too greatly to rule that these men were suspects because the shipowner paid them. So, it's not so simple, when you think it over.

We will go ashore and look at *Bollinger* v. *Randall*, 84 Pa. Super. 644, to emphasize the dichotomy between land and sea. Here a minor's claim for personal injuries was settled for approximately $600. Later it was discovered that the injury had caused the loss of sight of the left eye. The court refused to vacate the settlement

2. "The range of 'negligence' under the Jones Act has become wide indeed. It covers all types of unseaworthiness, with the exception (at least in theory) of unseaworthiness for which the shipowner is in no way at fault" (LAW OF ADMIRALTY—Gilmore and Black, page 313).

"When plaintiff is allowed to combine a Jones Act count with an unseaworthiness count and go to the jury on both, and when a resulting verdict in his favor will not be disturbed if it can be supported on either ground, it becomes immaterial whether plaintiff can bear even the attenuated burden of proof of negligence which the Jones Act case law requires" (*idem* page 314).

Since the duty of the shipowner to supply a seaworthy ship is non-delegable and absolute, his negligence in failing to make the ship seaworthy becomes irrelevant and the authors conclude:

"The true measure of the success of the Jones Act is that it has become obsolete . . . its addition of a 'new' remedy to the maritime law has had the unanticipated effect of broadening the old remedies, so that the new remedy . . . has become unnecessary" (*idem* page 315).

in the absence of proof of fraud in procuring it. The court said, "There can be no doubt that had it been known that the minor plaintiff was to lose the sight of his eye as a result of the accident, the settlement would not have been approved . . ." but ruled that, "settlements are necessarily based upon the facts which are then available to the parties, and there is always the risk that the injuries may prove to be more serious or less serious than then contemplated . . ."

Thus, the minor on land who is admittedly incompetent is refused relief, but the seaman who may in fact be extremely competent is granted relief on the contrafactual fiction that he is little better than a low grade moron.

Faced with such solemn nonsense, the temptation to speculate about the origin of the wardship fiction is irresistible. Someone has brightly said that a fiction is like a family that is coming up in the world: it fits itself out with an ancient lineage. But the lineage of our fiction does not appear to be very ancient.

At one time there was no marked divergence between the common law and admiralty rules in the treatment of employees. The relation of worker to employer in medieval times was largely a matter of status. Then came the ascendancy of "mercantilism" whose sole object was to increase the national wealth. Trade restrictions and monopolies were imposed as a means to that end. Then the idea burst upon economists, that if each individual were permitted to follow his own selfish interests, national wealth and welfare would be best promoted. (What's good for General Motors is good for the nation.) This theory of *laissez-faire* was enshrined by Adam Smith in his *Wealth of Nations* (1776), revised by Ricardo and Herbert Spencer, and came to dominate British and American legislatures and courts. "Liberty of Contract" was the guiding star. Thus, the employee was bound by his contract, though harmful to himself in the sacred name of liberty, and it later required a Holmes to protest that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics" (*Lockner* v. *N. Y.*, 198 U. S. 45).

In admiralty, however, a different answer was given. Lord Stowell in *The Minerva*, 1 Hagg. 347 (1825), said: "To such men [seamen] no such response can be made, as that which is irresistibly made in other cases of contract—it is your own contract, you have signed it with your eyes open . . ." Stowell justified his different treatment of seamen on the assumption that they were helpless in contracting with their employer. Admittedly Stowell greatly influenced Story in admiralty matters. However, it does not appear that the land worker was at any less disadvantage *vis-à-vis* his employer than the sailor at this period of the nineteenth century. Since helplessness of the individual worker cannot be said to be an idiosyncratic characteristic of the seaman, we must look elsewhere.

Judge Frank from whom I have drawn liberally in the foregoing historical sketch finds the reason in the dependence of England on sea power. In *Hume* v. *Moore-McCormack Lines*, 121 F. 2d 336, 345, 1941 A.M.C. 1079, 1095, he wrote:

> . . . we should note an intensely practical influence . . . sharply manifesting itself in the early 19th century admiralty decisions relating to seamen, which may give us the answer to our question: there is an explicit recognition of the importance of sea-power as an agency of commerce and of national defense. See Harden v. Gordon, supra; The David Pratt, supra; The Juliana, supra. National defense vitally affected the nation as a whole. Such matters were not to be left, a la laissez-faire, to any mere invisible hand guiding the ways of striving individuals bent on purely personal gain. The hand that guided national defense must be visible and forceful; the nation's very existence being at stake, there was no room, when it came to sea-power, for the minimalist dogma that the best government is invariably that which governs the least. The Juliana was decided by Lord Stowell, seven years after Waterloo, when memories of Napoleon's threatened invasion of England, his "continental system" and Trafalgar were still fresh. Story, deciding Harden v. Gordon, in 1823, would not have forgotten the humiliating events of the war of 1812. To protect the men who manned the ships was of prime importance.
>
> It would be absurd, of course, even to suggest that, in the prior course of English and American history, there had been no lively appreciation of the worth of sea power: Legend ascribes the foundation of the English navy to King Alfred; William the Conqueror knew what he was about when he established the Cinque Ports; Edward III followed his father in proclaiming himself "Sovereign of the Sea"; Henry VIII created a permanent royal navy; in order to revitalize a trade helpful in time of war, the fishing industry—weakened by the Reformation which did away with the religious obligation to eat fish—Edward VI established "Political Lent" by a statute requiring fish, instead of flesh, to be eaten on Fridays, Saturdays, Ember Days and during Lent; the adventures of men such as Drake, Frobisher and Raleigh, and the defeat of the Spanish Armada, tell of the marked interest in sea power in Elizabeth's reign; the troubles of Charles I over "ship money" are part of the story; no less is the serious side of the life of Samuel Pepys, who, famous as a diarist, is honored as a great Secretary of the Admiralty; etc., etc.
>
> For all that, this point remains: One of the impulses which apparently contributed to the survival of the admiralty doctrine as to seamen was vigorously reenforced by early 19th century events affecting both England and this country. And that stimulus still has vitality. See Calmar S.S. Corp. v. Taylor, 303 U. S. 525, 528, 1938 A.M.C. 341, 343, 58 S. Ct. 651, 653, 82 L. Ed. 993, where the court (citing Harden v. Gordon) speaks of "the maintenance of a mer-

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chant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service!"

Let us admit reluctantly that when it comes to history, economics and science, the Bench and the Bar are perforce jacks-of-all-trades (due respect for the robe prohibits the completion of the cliché) and Judge Frank may after all have complicated a very simple matter. Tales of the days of wooden ships and iron men speak eloquently of the perils of the sea and the exploitation of the common sailor. It may be that the wardship fiction owes its origin to the compassion of the judicial breast unprompted by consideration of national interest. Of course, conditions of the laborer on land were no bed of roses, but perhaps his condition was so familiar that it lacked the dramatic spur to command emotion or attention. If Judge Frank has not convincingly argued his point of view, he has at least done it delightfully.

This little tour through the "Alice in Wonderland" of the admiralty must have an end and a point, and here it is: Whatever the origin of the wardship theory may have been, it is judicial nonsense to apply it today. The "seaman" is the equal in education, earning power and labor union protection of his opposite number on land. His trade is no harder or more perilous under modern conditions than that of the laborer on land. The law relating to seamen has developed into a law of "status", reversing Sir Henry Maine's brilliant generalization that social progress has proceeded from status to contract. It is time to take a good long look at the facts and apply our old friend "*cessante ratione legis cessat lex ipsa*". As Mr. Justice Holmes said, "it is revolting to have no better reason for a rule than that it was laid down long ago" and "it is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past" (10 Harv. L. Rev. 457, Collected Papers (1920), 167, 187).

Justice Story's description of our jolly ward no longer fits the facts (if it ever did). He has grown to sturdy manhood and no longer needs to be protected from his imaginary childish follies.

To return to Blades and Mr. Solly, whatever the modern "Seaman" is, he most assuredly is not *in*sane.

Are Beginning Law Students Adequately Prepared for the Study of Law?

Addressing the Joint Session of the Section of Legal Education and Admissions to the Bar and the National Conference of Bar Examiners at the 82d Annual Meeting of the American Bar Association last August in Miami Beach, Dean Maloney indicated a number of current weaknesses in prelegal education. He pointed out the crying need for earlier identification and better counselling of prelaw students, and called for all-out help from the Bar in attracting a bigger share of the better students to the profession.

by Frank E. Maloney • ***Dean of the College of Law, University of Florida***

ARE OUR INCOMING law students adequately prepared for the study of law? Along with most of my fellow law teachers, I believe the answer is no. Available evidence indicates that the members of the National Conference of Bar Examiners would concur in this answer. Even after our law schools have rejected a considerable number of the weaker applicants, and then have culled out up to half of those who are admitted to the schools, many of those who do survive the rigors of the law schools are still rejected by the Bar Examiners as being inadequately prepared for entry into our profession. While a share of the blame for these failures on the bar examinations can, of course, be placed on the law schools, statistics indicate that for the most part the students that do fail the bar examinations have made the poorest law school records,[1] and these students in turn almost invariably come from our weakest applicants, those who were most poorly equipped to enter upon the study of law.

One solution to the problem is to raise the requirements for entrance to our freshman classes, and this the schools are doing and will continue to do at an accelerated pace as the number of applications from students seeking a legal education increases in the next few years. The better solution, however, is to press for a more adequate prelegal education for those students who intend to go into the study of law and to see that they are properly informed about the importance of their prelegal education.

Prelegal education was the subject of considerable discussion at the important conference on legal education called by the University of Michigan Law School earlier last year—a conference at which representatives of most of the accredited law schools, along with undergraduate educators and outstanding members of the American Bar Association, re-examined our system of legal education for the purpose of planning for the proper training of America's future lawyers.

Recognizing the deficiencies in the prelegal education of so many of our students, the members of that conference strongly recommended that the Association of American Law Schools explore with undergraduate college administrators methods of providing more effective use of post-high school study as it relates to legal education. The conference further recommended that following such a study, a full-fledged conference should be called on the subject of prelegal education similar to the Arden House Conference on Continuing Legal Education last year. To be fruitful, such a conference would of course require full participation of both teaching and practicing members of the profession.

Historical Perspective

Before any attempt is made to catalogue the weaknesses of present-day legal education, it may be helpful to scan rather quickly the changes in prelegal education requirements over the past century to help set the present critique in its proper perspective. One hundred years ago, only nine states prescribed *any* period of study for admission to practice, and often the only requirement was residence in the state and proof of good moral character. The American Bar Association has led the fight over the last eighty years for the establishment of adequate professional standards. In 1879, it endorsed the requirement of a high school education followed by a three-year law course. In 1921, under the leadership of Elihu Root, its criterion for approval was raised to two years of college work as a prerequisite for entry into law school and procedures were set up for establishing American Bar

1. See Florida Board of Bar Examiners, A STATISTICAL REPORT OF FLORIDA BAR EXAMINATIONS 1956-1958, for a report listing the ranks, bar examination scores, and law school averages of the 1097 examinees who took the Florida Bar examination during a two-year period.

Association inspection and approval of law schools. In 1950, the present requirement of three years of college work for entry into a three-year law school course was made a prerequisite for American Bar Association approval.[2] Today there is a strong movement among the law schools toward requiring a degree for admission, and only last year the Supreme Court of Ohio established this prelegal education requirement as a prerequisite for admission to the bar examination in that state. The possibilities of acceleration through summer study largely overcome the objection that seven years of post-high school education before entering practice is too long a period of prelaw preparation.

The Reason for the Change: Education for Statesmanship

What are the reasons behind the move toward the requirement of a college degree as a prerequisite to entering law school? The attitude of the law schools concerning their obligations to society in relation to legal education has been undergoing a decided change since World War II. At the turn of the century and before, during the ascendency of the analytical school of jurisprudence, the study of law was looked upon as a thing apart, and the one important requirement for prelaw education was that it train a man to reason accurately. Today, with the added recognition of law as a scheme of social control, we have come to realize the importance of the relationship between law and the total body of knowledge of man and his environment, and as our concept of the job of the lawyer has expanded, so has our concept of what is relevant, in the prelegal sense, to the study of law. As the United States more and more assumes a position of world leadership, we realize that legal education now must train men not only for positions of leadership in American society, but also for what Dean Stason of Michigan described last year at the Ann Arbor Conference as a new dimension. What is needed is a well-rounded program of legal education for statesmanship as well as for high craftsmanship in the practice of law. We must examine in this light the qualities the law schools should demand of our raw material and ask ourselves how this material measures up to these needs.

Criteria of the Association of American Law Schools

The Association of American Law Schools issued a statement of policy on prelegal education in 1952 which sets forth three qualities which its members believe to be fundamental to the attainment of legal competence. These are education for comprehension and expression in words; education for critical understanding of the human institutions and values with which the law deals; and education for creative power in thinking.[3] To these three might well be added a fourth, education for the development of intellectual honesty and integrity.

The first of these qualities, the ability to comprehend and express oneself adequately in words, could well be the subject of a separate article.[4] Suffice it to say at this point that lack of ability to communicate on the part of law students has been the subject of continuing comment in legal journals, and criticism of this weakness is being re-echoed constantly by our legal educators.[5] If we have not yet found a solution for this problem, which, as the recent Conant report so ably demonstrates,[6] has its roots in weaknesses in the teaching of English in our high schools, it certainly is not because we lack awareness of its existence.

The second prelegal education objective set forth in the policy statement of the Association of American Law Schools is education for critical understanding of human institutions and values. Many of our students come to us so sadly deficient in this area that they are not only handicapped in their law school education, but are unable, in the short time that we are able to devote to this phase of their training, to do much by way of overcoming their handicaps. But the law schools so far have been unwilling to require the study of specific courses in this area as a prerequisite to the study of law. Failure to take more definitive action is probably due in part to the fact that many of us are only now becoming aware of the need for training our graduates for statesmanship, for local and world leadership, in addition to training them to become skilled craftsmen. I suspect, however, that we also fear that in some colleges the courses in this area may be so weak as to be almost valueless to the student, or worse, may be taught so dogmatically that, to use the words of Dean Roscoe Pound, "in a few years what he learned will have been superseded and yet have been so thoroughly fixed in his mind that he is much worse off than if he had had no instruction in the subjects at all".[7]

But with our increasing awareness of the absolute necessity for training our graduates for leadership as well as craftsmanship, we have now reached the point where a thorough re-examination of our position concerning the requirement of more intensive study of our social structure and the relation of politics to law may well be called for. In making this re-examination, however, we must take into account the fact that the strongest courses in one college may be in the field of history, in another in sociology, in a third in economics. It is more important that a student master rigorous courses than it is to cover particular subjects, so long as some coverage in these or related areas is attained.

The third task we would set for prelegal education is development of creative power in thinking. This quality is invaluable to the lawyer both as craftsman and as statesman. As a means of developing this quality, we have come to recognize the necessity for training the prelaw student to think through a

2. See Vanderbilt, *A Report on Prelegal Education*, 25 N. Y. U. L. Rev. 199, 217-220 (1950) for a detailed account of these historical developments.

3. Pre-Legal Education: A Statement of Policy by the Association of American Law Schools (1952).

4. Deficiencies in communication skills was the topic of Vice Dean Theodore H. Husted, Jr., of the University of Pennsylvania Law School at the section meeting at which this paper was delivered. A paper on the same topic by the author was published as a part of the proceedings of the 1959 Ann Arbor Conference on Legal Education; see Maloney, *The Relation of the Law School to General Education: Deficiencies in English*, The Law Schools Look Ahead: 1959 Conference on Legal Education 211 (University of Michigan, 1959).

5. See Harno, Legal Education in the United States 131 (1953); Vanderbilt, Studying Law 654 *et seq.* (2d ed. 1955); Prosser, English as She Is Wrote, 7 J. Legal Ed. 155 (1954); *Report of the Dean of Columbia University School of Law for the Year 1957-58.*

6. Conant, The American High School Today 47, 50 (1959).

7. Vanderbilt, *A Report on Prelegal Education*, 25 N. Y. U. L. Rev. 199, 245 (1950). The quotation is part of Dean Pound's answer to a questionnaire from Judge Vanderbilt, circulated as a part of his definitive study of prelegal education.

problem in its entirety. We have come to call for a study of courses that develop the mind rather than those that stress informational content. As the recent Report of the Lafayette College Commission on prelegal education put it, we have objected "to the failure to develop the intellectual maturity of entering students",[8] a maturity which, as that report points out, "comes from rigorous intellectual discipline derived from the mastery of any subject undertaken by a student, rather than from the mere content of the subject matter". Since intellectual discipline of this sort can be required in almost any field of study, and since almost any college course can be taught in such a way as to become an easy spoon-feeding of mere information in which little independent thinking is required or encouraged, we again have been unwilling to specify any particular course or group of courses as prerequisites for the development of this objective. Recognizing the possibilities of weakness in any area, we have limited ourselves to objecting, to use the words of Judge Vanderbilt, "to the methods of college teaching . . . to the failure to train students to see, to read, to use source material, to assimilate masses of information, to reflect clearly on what they have learned, to use their knowledge in problem-solving, and, in the process, to express themselves, both orally and in writing, in good English".[9]

Since the opportunity to think through problems in depth is most likely to be presented in the final year of college in completion of a college "major", it seems likely that the law schools will continue to emphasize the desirability of completing undergraduate education rather than moving toward specific course prerequisites as the best means for developing the creative ability we so strongly desire.

Honesty and Integrity

Finally, there is the problem of the development of intellectual honesty and moral integrity. One lawyer who had had considerable experience with the administration of justice in England recently told me that he feels that our Bar falls far below that of England in this respect. This is a serious indictment of our educational system for failing to instill these moral values in our students. No doubt this failure springs in part from the earlier preoccupation of our law schools with separating law from morals, and excluding the latter from our law classes, as tending to lead to sloppiness of legal thought. But the law schools are not the only culprits. The materialism and utilitarianism of our age is already instilled in our students by the time they arrive at the doors of our law schools. An awareness of the moral problems and moral values inherent in our legal and political decisions and a keenly developed sense of ethical values must be brought to the law school, and the student who lacks these values is no more adequately prepared for the study of law than is the one who cannot reason or communicate, or who lacks understanding of the human institutions around him.

What Can We Do About It?

If we grant that many of our beginning law students are not adequately prepared for the study of law, is there anything we can do about it? It seems to me that there are several things that can and should be done. The first is to implement the recommendation of the Ann Arbor Conference for an immediate and thoroughgoing study of methods of obtaining more effective prelaw study. The American Bar Association might well consider throwing its weight behind this worthwhile recommendation.

Along with a rethinking of the problem of preparation for the study of law, it is necessary to develop a program for the earlier and more careful identification of those students who intend to undertake the study of law, and, once having located them, to inform them more fully of our thinking on this crucial subject. Dean Vanderbilt's definitive study indicates that at least one third of our students make up their minds to study law before leaving high school and that three fifths have made up their minds prior to the junior year at college.[10] We should be able to reach and counsel this group while their college education is still at a stage in which they can profit by our advice.

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The period of intensive study called for by the Lafayette Commission usually comes in the last year of college work, in a "major" area, and it is here that real intellectual discipline can be developed.

Most of our colleges have guidance advisers to counsel entering freshmen and help them to plan their college programs. But when the guidance adviser identifies a pre-law student, is he qualified to give him more than vague counsel? Most often, I am afraid, he is not, for he himself is not a lawyer and lacks knowledge of the importance of our profession and of the goals we are seeking. Disseminating information such as the Association of American Law Schools' Policy Statement on Prelegal Education to existing prelaw counsellors would help. But a better approach would be to provide counselling for prelaw students by a panel of lawyers and law teachers. The American Bar Association might consider sponsorship of such an idea as a means

8. Lafayette College, *Report of the Commission on Prelegal Education*, 6 J. Legal Ed. 174, 178 (1953).
9. Vanderbilt, *supra*, note 7 at 215.
10. *Id.* at 206.

of helping to indoctrinate our prelaw students properly.

One way of getting better prepared beginning law students is to raise the admission standards of our law schools. This alone would alleviate many of our problems. The coming increase in enrollment will provide many schools with the opportunity to raise their entrance requirements, and this in turn will motivate many of our abler prelaw students to work harder and thus obtain a better prelegal education.

When we talk about raising admission requirements, however, we are talking about improving the bottom group of our prelaw students. It is certainly desirable to work toward cutting down on the human and economic waste involved in the high percentage of failures among the weaker entering students and the elimination of the drag these students constitute on our faculties and abler students. But we must not overlook the students at the other end of the educational scale. There is a real need today to develop means for attracting to the law schools our fair share of the best college students.

Approximately three times as many top students today are being attracted to medicine as to law, and the current pull of the scientific career and of federal science scholarships is also taking its toll.[11] Can we afford to be satisfied with mediocrity? We certainly must have our share of the best young people if we are to develop and maintain the leadership which our profession must provide for the maintenance of law and order both in our country and throughout the world. Training in law is a part of the education of the majority of the political leaders of our nation. Lawyers dominate not only Congress and our state legislatures, but naturally assume positions of leadership in all phases of our government. We badly need a fair share of our best brains in these positions of leadership if we are to survive as a nation in these perilous times. Here again the Bar can and must exercise its leadership, both in explaining the function of lawyers to these bright young students so that they may be attracted by the best in the legal profession, and by providing the law schools with financial help by way of scholarship aid to offset the pull of scholarships in other fields and help encourage a higher percentage of our best young minds to enter the legal profession.

In summary, we must recognize that the profession has not been fulfilling its obligations to those college students who will be making a career of the law.

In part, no doubt, this is due to our failure to think through what society's demands for and on lawyers will be in the next quarter century. A full-fledged analysis of the jobs to be expected of future lawyers seems indicated. This is an undertaking that will call for substantial financial expenditures. The American Bar Foundation might well consider urging and supporting such a study.

Once we have decided what the lawyers of the future will be doing, we will be in a better position to advise our prelaw students concerning a sound prelegal education. We must identify them more quickly, and then provide them with trained and interested counsellors from the leaders of the Bar and the law teaching profession rather than leaving this important matter, as we do now, in the hands of undergraduate educators who may not fully understand our needs and problems.

Finally, we must recognize the need for attracting more of our best undergraduate students to legal careers. Undoubtedly strong students are needed in the medical and scientific fields. But the possibilities for progress and indeed the very existence of these fields of study depend on the maintenance of peace and order in our national and international societies. It is here that the legal profession can make its greatest contribution. It is our duty to make sure that our profession is provided with its share of good young minds with an understanding of and devotion to these ends.

11. See Malone, *Lawyers—Supply and Demand*, 98 TRUSTS AND ESTATES 186 (1959); Malone, *Lawyers in the Sputnik Era*, 13 WYO. L. J. 101, 105 (1959); Smith, *A Sequel: The Bar Is Not Overcrowded*, 45 A.B.A.J. 945, 946 (1959).

The Use of Auditors to Cut Court Congestion

Mr. Thorsness describes new legislation in Illinois aimed at reducing court congestion in that state. The basic pattern of the new Illinois statute follows Massachusetts' "auditor" system—appointment of auditors to assist the judges in the determination of cases.

by Lionel Thorsness • ***of the Illinois Bar (Chicago)***

THE 1959 SESSION of the Illinois legislature passed House Bill No. 813 and Governor Stratton signed it. This act is to facilitate trials of law cases. It enables the court, with the agreement of the parties, to appoint a referee by an order of reference, which order shall specify the referee's duties.

The referee is to make written report to the judge which may be accepted or rejected in whole or in part. If litigants are not satisfied with the report and want a jury trial, the referee's report as approved by the court goes to the jury as prima facie evidence and can be rebutted. This law follows the Massachusetts law providing for appointment of auditors. In Massachusetts, however, the consent of litigants is not "necessary" and the court may require the county to pay auditors' fees or may tax the auditors' fees as costs.

It takes four to seven years or more to get to trial in personal injury cases in Cook County, Illinois. This means justice denied to thousands. Men and women who have dependents and whose sole means of support are their earnings cannot wait years to have their cases heard. Further, witnesses die, move away or cannot be found and sometimes the injured die before the case comes to trial.

All committees who have made a study of the administration of justice in Cook County are in agreement on one point and that is that more courtrooms are needed. Most committees are in agreement that more judges are needed.

The Governor is quoted as saying he would approve and sponsor legislation creating more judgeships if Cook County would furnish the courtrooms.

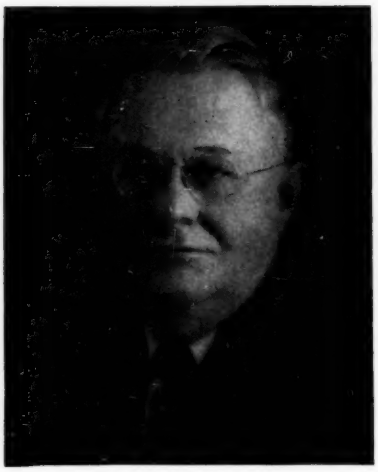
The inability to administer justice in Cook County is a reflection on the intelligence of both the Bench and Bar of Cook County in particular and the State of Illinois in general.

We are trying to make the administration of justice of the horse and buggy age function in the most progressive age scientifically in the history of man. Now the buggy is bogged down in the mire of congestion.

In Massachusetts 140 years ago the legislature, knowing that a judge had the inherent power to have whatever assistance he might determine necessary to make a decision, provided that the judge might appoint an auditor and give him directions as to what he wanted him to do so as to enable the judge to make a decision. Provision was made for compensation for the auditor. The judge could direct the auditor to determine on what matters there was agreement, or to define the issues or to give an accounting, or to hear witnesses and make recommendations. It was specified that the report was to recite in detail the basis of the recommendation, which the judge could accept in whole or in part. A dissatisfied litigant could have a jury trial. The auditor's report would then be admitted as prima facie evidence only and could be rebutted. The auditor could not make a decision in any case, only a recommendation. He could not be delegated the power of decision.

Justice Brandeis said in *Ex parte Peterson*, 253 U. S. 300, "...This court relied especially upon Holmes v. Hunt, 122 Mass. 505, and called attention to the fact that there the statute making the report of an auditor prima facie evidence at the trial before a jury was held to be a legitimate exercise of legislative power over rules of evidence, and in no wise inconsistent with the constitutional right of trial by jury. The reasons for holding an auditor's report admissible as evidence are, in one respect, stronger than for giving such effect to the report of an independent tribunal like the Interstate Commerce Commission. The auditor is an officer of the court which appoints him. The proceedings before him are subject to its supervision, and the report may be used only if, and so far as, acceptable to the court..."

There has been much talk and some action on pretrial hearings and other means of expediting trials by way of limiting judges' inherent power to try a case. Why devote our energies to limiting the judges' inherent power?



Lionel Thorsness was admitted to the Illinois Bar in 1917 and practices in Chicago. He served as an officer in the Quartermaster Corps in World War I and has long been active in the work of the organized Bar and civic and patriotic associations. He served as a master in chancery of the Superior Court of Cook County from 1929 to 1937.

Judges' Inherent Power

Again quoting from Justice Brandeis' opinion in *Ex parte Peterson:* "Courts have (at least, in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties... This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific Judicial duties, as they may arise in the progress of a cause... A compulsory reference with power to determine issues is impossible in the Federal court because of the 7th Amendment... but no reason exists why a compulsory reference to an auditor to simplify and clarify the issues and to make tentative findings may not be made at law when occasion arises, as freely as compulsory references to special masters are made in equity... *The inherent power of a Federal court to invoke such aid is the same whether the court sits in equity or at law.* We conclude, therefore, that the order, in so far as it appointed the auditor and prescribed his duties, was within the power of the court."

The appointment of referees in bankruptcy is now accepted practice.

Judge Irving R. Kaufman, of the United States District Court for the Southern District of New York, in an address given at the Seminar on Protracted Cases held at Stanford University on August 22, 1958, said: "While I recognize the fact that pretrial hearings should be supervised by a Judge, still there is no reason why the Judges cannot delegate some of their other pretrial duties which presently constitute a great drain on our judicial manpower. To believe that our judges can continue unaided to handle these myriad pretrial duties without some phase of judicial business being sacrificed, is to blind ourselves to reality. While I do not deny the importance of pretrial, it is because I don't want the vital and important functions of the judge to suffer because of his excessive diversion into these less important details that I advocate this procedural assistance. It is because I want them to try more cases, not fewer, as must be the case, if they are to be diverted by deep involvement in every procedural sally that goes into the preparation of the case for trial, that I urge some assistance for the court. In any event the opposition to the limited use of a pretrial master in the federal courts based on the ground that such a procedure represents an abdication of the judicial function does not seem justified. Where its use is further confined to the special 'big case' there is even less doubt as to its legality.

"If we approach our task with the knowledge that the suggested reference is not susceptible to mechanical application, but must be discriminately invoked with intelligence and foresight and that those appointed to serve as masters must be men of impeccable character and standing, I am sure the final results will prove favorable. Let us not be guilty of the accusation hurled at the Bar that it is unwilling to follow new paths. Let us not cling blindly to present practices, unwilling to experiment with a procedural weapon which may bring about better judicial administration simply because 'What was, is, and must be'."

Results of Usage of Massachusetts Auditor System

In the December, 1958, *Journal of the American Judicature Society* at page 125, there appears the following: "The most important device used in combating court congestion in Massachusetts has been 'the Massachusetts Auditor System'. The Auditors are members of the bar, about eighty in number, to whom are referred certain types of cases for a hearing on the facts. The hearing is conducted like an ordinary trial, and at its conclusion the Auditor prepares and files with the court, a written report of his findings of fact, including, if appropriate, the amount of damages.

"Neither party ever loses his right to a jury trial, but very few auditors' cases ever are returned for trial. If they are, the auditors' findings are read to the jury. Between 1934 and 1942 it was used in some 47,000 Massachusetts cases, only 2 per cent of which went to trial. In 1942 it was discontinued because of wartime dislocations and also because the docket had become current. In 1956 with delays getting out of hand again, it was reinstated under the leadership of Chief Justice Paul C. Reardon of the Superior Court. At first limited to motor vehicle tort cases, it has been made applicable this year on a selective basis to actions for general liability such as claims for falling down stairs in department stores, small contract actions such as brokers' commission cases, and the like. What has been the result of the use of these measures in Massachusetts Courts? The Superior Court in Worcester County reduced its delays by twenty-nine months through the use of auditors. In general, here is what Chief Justice Reardon says:

" 'While a few individuals in the trial bar are still unhappy about the program of the Court, the Court has the results to prove the efficacy of its methods. As of July 1, 1958, there were but three areas where cases waited over a year for trial after being brought. The quality of the litigation in the Court is gradually improving with consequent benefit to the Bar, and those parties who before were forced to wait for periods up to four and a half years

are now being heard within a reasonable time after their cases are entered.'"

The judge should be enabled to exercise his inherent power to obtain whatever assistance and information he deems necessary in order to make a decision. Not giving a judge an assistant (sometimes called a referee or master or magistrate or auditor) is like refusing a corporation president a secretary or the president of a bank, vice presidents.

Our judges do not have assistance in civil cases. They must spend much of their time on procedure. They must determine on what matters there is agreement, define the issues and obtain the necessary information to make a decision. It is the decision that represents the important "judge-power". Our judges should be given the assistance necessary to enable them to make more decisions and thereby dispose of more cases.

I asked a trial judge hearing personal injury cases in Cook County what percentage of cases before him went to trial and what percentages were settled. His answer—15 per cent went to trial and 85 per cent were settled. We discussed what happened before the judge in these cases that were settled. It could be summed up as follows: Defendant offers so much—plaintiff says no, I want so much. The Judge makes his suggestion and finally the case is settled. I asked the judge if he thought his actions in the negotiations were strictly judicial—was he exercising judge-power? His answer was—not strictly speaking.

It makes no difference whether you call them referees, masters, or auditors, their functions are the same—namely to assist the court in the administration of justice.

The practice of courts making references for specific purposes is and has been used extensively in England.

While the law authorizing auditors in Massachusetts has been in existence for over 140 years, the courts have not always appointed auditors. It would seem that it has only been used when court calendars have become congested. If the courts do not need assistance, they will not appoint auditors; it is in the discretion of the court. It is hoped that this act passed by the Illinois legislature will be used extensively and have the same results as were had in Massachusetts.

The Frightening Rise in Crime Endangers Government by Law

President Osro Cobb of the Little Rock, Arkansas, chapter of the Federal Bar Association, at the Annual Meeting of that organization on November 4 made a suggestion for the organization of grassroot committees and commissions to work on crime prevention. He feels that all other domestic challenges are dwarfed by comparison with this problem. He said in part:

> Every thoughtful citizen is disturbed and appalled at the frightening rise in the incidence of crime. On September 2, 1959, Attorney General William P. Rogers released information compiled by the Federal Bureau of Investigation for 1958 which showed that crime in this country increased 9.3 per cent in 1958 over 1957. The total cost of crime in the United States in 1958 was estimated at 22 billion dollars, and this staggering figure did not cover the human values lost. Arrests of juveniles in 1958 increased by 8.1 per cent while arrests of adults rose 1.8 per cent. This ominous increase in crime presents our greatest domestic challenge.
>
> We must find ways and means to reverse this lawless trend.
>
> At present, we expend colossal efforts in time and money to hunt down, prosecute, and incarcerate offenders of state and federal laws. All of this action, however, is usually taken after the fact of the commission of the crime—after irrevocable damage has been done to both the victim and the violator and their respective families. It seems to me that a compelling need exists to supplement these prosecutive efforts by a vigorous program of action to prevent crime. We cannot sweep this national crime problem back under the carpet.
>
> I believe that every municipality of 1,000 people or more and every county and state should have an active hard-hitting committee or commission on crime prevention. The work of such organizations should pay enormous dividends in both lives and property. We already have excellent organizations working to prevent forest fires and highway carnage. We must likewise find ways to harness public opinion so that we can reach our teenagers and, indeed, all of our population to make certain that all of our available resources are utilized in preventing crime. Only by some such affirmative action can we hope to reduce or remove those conditions spawning crime.
>
> Abraham Lincoln so aptly said, "Let reverence for the laws be breathed by every American mother to the lisping babe that prattles on her lap. Let it be taught in schools and colleges. Let it be preached from the pulpit. Let it be proclaimed in legislative halls. Let it be enforced in courts of justice. Let it become the political religion of the nation. And let the old and the young, the rich and the poor, of both sexes and of all tongues and colors, sacrifice unceasingly upon its altars."
>
> Government by law is a precious treasure to mankind. We of this generation must find ways to make certain that we do not lose it.

The Control of Narcotic Drugs and United Nations Technical Assistance

Technical assistance to member nations participating in its strict narcotics control program is one of the newest projects of the United Nations Economic and Social Council. Mr. Swacker relates its accomplishments to date.

by Frank W. Swacker • *of the New York Bar (New York City)*

THE INTERNATIONAL community and humanity in general stand to acquire another plus, as the United Nations Economic and Social Council[1] prepares to consider a report by the Secretary General made pursuant to Council resolution 688 (XXVI) on technical assistance to member nations participating in strict narcotics control.[2]

This praiseworthy action reflects a practical approach undertaken to aid in the solving of a serious world health, economic and moral problem. It stands paramount as a rebuttal to many of the ill-considered criticisms that have been hurled at the United Nations charging it with manifesting an unrealistic attitude in its efforts to alleviate adverse social conditions.

A review of the background of this agenda item presents a panorama which cannot be disregarded. We start with the proposition that the United Nations took cognizance of six prior international conventions and agreements dealing with the control of drugs aimed at protection of the individual against the dangers of drug addiction.[3] Add to this the establishment of the Commission on Narcotic Drugs by ECOSOC and the draft of a single convention designed to replace multilateral treaties which has been completed by the Commission at ECOSOC's request,[4] and it becomes readily clear there has been no quarrel with the concept that control machinery on an international level is and has been favored by many nations.[5] The Pandora's box which narcotic control opened for the larger narcotic-producing nations, however, contained economic maladjustment and hardship for those engaged in the cultivation of the drugs. It is the steps proposed by way of technical assistance affording a workable antidote for which the United Nations respectfully commands our attention and recognition.

The origin of the technical assistance for the narcotics control agenda item[6] under consideration can be traced back to an expression of interest on the part of a number of governments in receiving such assistance.[7] Among the nations seeking such assistance was Iran, a large opium-producing country which had of its own volition banned the cultivation of the opium poppy and passed laws[8] and regulations[9] to enforce such restrictions. Pending the rehabilitation of this agricultural economy with a substitute crop, Iran was much dependent upon the outcome of its appeal for such aid. In response to the request from Iran and other countries, the Commission on Narcotics recommended that technical assistance services of the United Nations and its specialized agencies give due consideration to the pleas of the countries concerned, addressing a resolution to ECOSOC requesting action consistent therewith.[10] This resolution[11] was accepted in preference to a more general resolution[12] submitted by the United States and Canada and was adopted by eleven votes to three with one abstention. At the twenty-second session of ECOSOC,[13] the resolution of the Commission on Narcotics and resolution 548E (XVIII) of July 12, 1954, were considered and adopted.[14]

The response of the Economic and Social Council in authorizing the use of technical assistance to help those governments requiring it was recorded when the Council adopted a series of resolutions to that effect designed to bring about the necessary adjustments

1. Hereafter sometimes referred to as ECOSOC.
2. See: Provisional Agenda Item 14. (C), Twenty-eighth Session. United Nations Economic and Social Council. Document E/3252.
3. Since there are so many narcotics, no attempt will be made here to consider each under international control, but a listing of narcotics receiving attention may be found (including those substances still under consideration by the Expert Committee on Drugs Liable to Produce Addiction of the World Health Organization) in the 1947-1958 Cumulative Index of the Commission on Narcotic Drugs of the Economic and Social Council Part II. (E/NL 1958/Index) U. N. Publication Sales No.: 59.XI.2. See also: U.N. Commission on Narcotic Drugs Survey of available information on synthetic and other new narcotic drugs prepared by the Secretary General, dated March 28, 1957 (115 pages) e/CN/.7/319 New York 17. N. Y.
4. Res. 159IID (VII), and 246D (IX).
5. *War Against Drugs* (International basis of illegal trafficking in drugs; international cooperation in attempts to control and suppress the trade). Allan Kerwood 2 WORLD VETERAN, pages 12-14, March, 1957—See also declaration of U. S. Policy in re: Opium Poppy Control Act of 1942 at 21 U.S.C.A. Section 188.
6. See footnote 2.
7. E/3077.
8. E/NL./1956/1.
9. E/NL./1956/1.
10. E/CN./7/1.139 (Thirteenth Session).
11. *Id.*
12. E/CN./7/L.141.
13. 947th Plenary Meeting.
14. Res. 626D (XIII).

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in the economies of the governments concerned.[15]

One of the most notable of the requests for assistance subsequently received was that of Afghanistan.[16] In 1956, the Commission had decided to include Afghanistan among the countries listed in Article 33, Paragraph 1(a), of the second draft of the proposed single convention as a nation entitled to produce opium for export[17] in view of the economic needs of its poppy cultivators. Despite this authorization, after following with interest the experience of Iran in carrying out its new policy of totally prohibiting the production of opium, Afghanistan took the suggestion of Iran to heart that it should do likewise and seek United Nations technical assistance for its poppy growers and the help of friendly nations. In the interest of humanity and in a spirit of international cooperation, Afghanistan accordingly not only readopted its policy of complete prohibition of cultivation of trade, purchase, sale, import, export and use of opium but promulgated a law to that effect on November 24, 1957.[18] Needless to say, the deprivation of the livelihood of the farmers as a consequence thereof raised havoc with an already tight financial situation.[19]

In view of the foregoing, a draft resolution[20] was submitted by the representative of India by which the Commission would recommend that the Economic and Social Council express its sense of the significance of the policy adopted by Afghanistan, wish it success in its undertaking and invite attention of the General Assembly and specialized agencies concerned (especially the relevant assistance organs) to the importance the speedy achievement of these aims had for the social and economic development of Afghanistan. The draft resolution submitted by the representative of India was unanimously adopted by the Commission.[21] This draft resolution as amended[22] was unanimously adopted at the 845th meeting of the General Assembly.[23] Further by way of implementation, the Technical Assistance Commission of the United Nations discussed the subject of assistance for narcotics control at the 168th and 169th meeting, unanimously adopting the resolution of Brazil, France and the United States[24] recommending that ECOSOC:

> 1. *Requests* the Secretary General, in consultation with the interested specialized agencies, to review the nature and scope of assistance requested by Governments for increasing the efficiency of their measures to control the production of narcotics, to eliminate drug addiction, and to suppress illicit traffic; to explore the extent to which such assistance can be made available under existing programmes; and to formulate as may be necessary proposals regarding the assistance which might be made available by the United Nations and the interested specialized agencies, with an estimate of the cost;
>
> 2. *Requests* the Secretary General to report on these matters to the Commission on Narcotic Drugs at its Fourteenth Session, and subsequently to the Twenty-eighth Session of the Economic and Social Council.

ECOSOC adopted this resolution without change.[25]

This action by the Council will bring about a review of the financial arrangements applicable to technical assistance for narcotics control with a view to enabling relevant applications for technical assistance to be made by governments and carried out by the organizations concerned. It suggested, in particular that the possibility be considered of making funds available by way of a separate financial allocation or the inclusion of an amount for the purpose requested within an existing separate allocation. In recognition that international machinery to combat narcotics traffic must be strengthened, Council resolution 688 (XXVI) was praised at the meeting of the Thirteenth Session of the General Assembly.[26]

Included among the types of assistance for narcotics control given are advisory services of experts from F.A.O., W.H.O. and T.A.A., fellowships and seminars. Of great importance are the expert agronomists who help work out crop substitution programs. A note by the Secretary General on implementation of requests for technical services and reasons why enquiries from some governments haven't been followed up by formal requests,[27] notes that principal among such reasons are (a) narcotics control is a late comer to the technical assistance program, (b) gains are less immediate than those which might be expected from other well-entrenched projects, and (c) the available funds in the technical assistance program are sufficient only for a minority of potential projects.[28] Nevertheless, it can be said without hesitation that the accomplishments to date are noteworthy and speak for themselves. Further, it is reasonable to assume such constructive programs are lending and will continue to lend their impetus to domestic thinking.[29]

15. *E.g.*, see Council resolutions 626E (XXII) and 667G (XXIV) on Iran and 667F (XXIV) on India and Morocco.
16. E/3077/Add. 1—E/CN.7/342/Add. 1.
17. E/CN.7/AC.3/7, and Corr. 1.
18. E/NL. 1958/13.
19. For a more detailed report on the Afghanistan situation, consult the report of the Commission on Narcotic Drugs, Thirteenth Session, E/3133—E/CN.7 354, Chapter V, Paragraphs 90-314.
20. E/CN.7/L.180.
21. Report of Thirteenth Session of the Commission on Narcotic Drugs E/3133—E/CN.7 354 Chapter V, Paragraph 313.
22. A/C.3/L. 670.
23. A/3954, page 10.
24. E/TAC/L. 167.
25. Official Records of the Economic and Social Council, Twenty-sixth Session, Supplement No. 1, E/3169, pages 14 and 15; 1042d Plenary Meeting, July 28, 1958.
26. A/3954, page 10.
27. Official Records Economic and Social Council, Twenty-sixth Session, Agenda Item 13, Annexes E/3077 and Add. 1.
28. Official Records of the Economic and Social Council, Twenty-sixth Session, Supplement No. 9 (E/3133), Annex 1, Paragraph 2, Section II.
29. *American Bar Association and the American Medical Association on Narcotic Drugs* by Advisory Committee to the Federal Bureau of Narcotics (1959), 186 pages plus tables and charts. 60c Superintendent of Documents.

The World Court and United States Domestic Jurisdiction

In this article, Mr. Clinton urges repeal of the Connally Reservation, the proviso attached to United States' acceptance of the jurisdiction of the World Court by which this country reserved for itself the right to determine what are matters of purely "domestic concern", beyond the Court's jurisdiction.

by Edmond J. Clinton

THE POWER OF the World Court to intervene in matters of domestic concern to the United States was made the subject of an editorial (entitled "World Courts and Local Law") which appeared in the *Wall Street Journal* on October 14, 1959. Thus, the attention of the business and professional community was focused anew on the so-called "Connally Reservation", and, I fear, rewarded with a distorted presentation of the situation.

In its declaration of August 14, 1946, the United States accepted the compulsory jurisdiction of the International Court of Justice under the "optional clause"—Article 36(2)—of the Statute of the I. C. J. in all legal disputes concerning:

> a. the interpretation of a treaty;
> b. any question of international law;
> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
> d. the nature or extent of the reparation to be made for the breach of an international obligation.

Our declaration of acceptance contains three reservations. Of these, it is the Connally Amendment which most dramatically demonstrates our suspicion of a more effective international law at the working level. The Connally Reservation declares that the Court's jurisdiction should not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America *as determined by the United States of America*".[1]

The American Bar Association and The American Society of International Law advocate the withdrawal of the Connally Reservation.

Now comes the *Wall Street Journal*, attacking the conclusions of a committee of the American Bar Association suggesting that the Connally Reservation be repealed.

The *Wall Street Journal* echoes some widely held misconceptions centering around the relationships between the World Court, human rights, the United Nations, the United States and domestic jurisdiction.

The editorial asserts that the Association's Committee "has suggested that the International Court of Justice will not ever become a really effective instrument until the United States permits the World Court more jurisdiction over matters of domestic and not merely international concern".

The *Wall Street Journal* then tries to support its position in a fashion which is surprising for this usually well informed, responsible and influential publication. The net of its argument follows:

The Committee wants to "get rid of" a safeguard which provides "that the party to judge what is of domestic concern to the United States is the United States and no one else".

"Hard-headed reactionary isolationists": this is the description the internationalists pin onto the heads of those who oppose the overthrow of the Connally Reservation.

The U. S. Senate adopted the Connally Reservation "before it would accept the World Court as part of the United Nations package" because the American Constitution guarantees to our people individual rights—such as free speech, peaceful assembly, the right of petition, trial by jury, the right to own property—which in the U. N. Charter, the Covenants on Human Rights, and the laws of many nations "are either not found or are strictly limited".

Treaties are no longer limited to intergovernmental agreements dealing only with international matters. United States courts have held that treaties can supersede the U. S. Constitution. Thus, the individual rights of our citizens are "already in jeopardy".

So, claims the *Wall Street Journal*, we have only two choices:

1. Continue to deny to the I. C. J. the right to interpret the Constitution of the United States "as it sees fit", or

2. Run the risk of permitting the "erosion" of the rights now enjoyed by our citizens.

It would be much better if the rest

1. I. C. J. YEARBOOK, 1955-56, page 199. Italics supplied.

of mankind would come up to our standards instead of cutting our rights and freedoms down to theirs.

"And", the editorial concludes, "we have an idea the people of this Republic also prefer matters that way, whatever the missionaries for World Government think is best for all of us".

Well now—what *are* the conclusions of the American Bar Association Committee which contribute to the *Wall Street Journal's* distraught condition?

In a statement issued by the Special Committee on World Peace Through Law, Charles S. Rhyne, the Committee Chairman, said:

> The . . . Connally Reservation which currently limits the usefulness of the International Court of Justice must be repealed before we can go much further with any program for world peace through law. Under the Connally Reservation the United States sits as a judge of the World Court's jurisdiction in each case filed against the United States and decides whether the case involves an international or domestic issue . . . This U. S. Senate distrust has been a major factor in reducing the Court's prestige and usefulness to the point that it has had only eleven cases to decide in thirteen years.
>
> Lawyers from other nations say our talk of a world ruled by law is hollow when we ourselves do not accept that thesis . . . Only the U. S. Senate can act to encourage, or block through inaction, progress toward the rule of law in the world.
>
> It is essential to exercise our national sovereignty for survival to offset the claim that we are giving up sovereignty . . .
>
> World government is impossible in today's world, but this program of application of the rule of law in courts and building new law in the world community is a practical and attainable forward step toward a peaceful world.[2]

In April, 1959, the American Society of International Law, through formal action, took the position that ". . . the United States should withdraw its reservation to the compulsory jurisdiction of the Court . . ." [3]

Herbert W. Briggs, Editor-in-Chief of *The American Journal of International Law*, acknowledges that "it is no secret that the tide of criticism has been rising against the Connally Amendment reservation". [4]

The *Wall Street Journal*, in claiming that the Association's committee wants to give the I. C. J. greater jurisdiction over domestic matters, launches its piece on a false premise. Not only does the U. N. Charter make the court "the principal judicial organ of the United Nations"; it also provides that the court "shall function in accordance with the annexed Statute . . . which forms an integral part of the present Charter". [5] So the court and its statute are tied to the fundamental principles of the charter itself. One of these, Article 2(7), deals with domestic jurisdiction:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter. . .

Furthermore, in accepting the compulsory jurisdiction of the I. C. J. a state agrees to "recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court" only with respect to those classes of legal disputes specifically enumerated in Article 36(2) of the statute.

Dr. Briggs notes that "Judge Manley O. Hudson has observed with regard to reservations excluding disputes relating to matters of domestic jurisdiction: 'It is difficult to see what is accomplished by this exclusion; if a dispute relates to questions which fall within exclusively national jurisdiction, it does not fall within one of the classes enumerated in paragraph 2 of Article 36.' "[6]

Briggs adds: "Since Article 36(2) . . . excludes by clear implication disputes relating to matters which by international law fall within the domestic jurisdiction of a state, question arises as to the need for inserting domestic jurisdiction reservations in declarations accepting the Court's compulsory jurisdiction."[7]

The I. C. J.—not the U. S. Government—should judge whether a dispute involving the United States falls within the proper jurisdiction of the court. *This* (in fact) is what the Association's Committee recommends—not that the court be given more domestic jurisdiction. Clearly, these are two different things.

But the *Wall Street Journal* is correct in illuminating the core of the Connally Reservation's purpose and effect: "the party to judge what is of domestic concern to the United States is the United States and no one else". It is precisely this barrier that the Association's Committee, the American Society of International Law and others wish to remove.

Only states, of course, can come before the court. The *general* jurisdiction of the court comprises only those "cases which the parties refer to it".[8] The parties must consent. They must, in the absence of acceptance of compulsory jurisdiction, "agree to refer the case to the court in order to establish its jurisdiction for that case", comments Hans Kelsen. Acceptance of *compulsory* jurisdiction, however, "makes a special agreement . . . unnecessary. Under Article 36, paragraph 2, the court has jurisdiction in a particular case only when both parties to the dispute have made the declaration . . . and by this declaration a state recognizes the jurisdiction of the court only 'in relation to any other state accepting the same obligation'. . .

"No state can be forced into court against its will. . . The jurisdiction which the court has under Article 36, paragraph 2 . . . is not a 'compulsory' jurisdiction in the true sense of the word. In order to establish true compulsory jurisdiction . . . the statute would have to provide that any member of the judicial community, party to any case whatever, is obliged to recognize the jurisdiction of the court

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2. 45 A.B.A.J. 587-8 (June, 1959).

3. 53 A.J.I.L. 663 (July, 1959).

4. See his comprehensive and valuable review of this subject in *The United States and the International Court of Justice: A Re-Examination*, 53 A.J.I.L. 301-18 (April, 1959).
For another timely discussion, see M. S. Rajan, *United States Attitude Toward Domestic Jurisdiction in the United Nations*, 13 INTERNATIONAL ORGANIZATION 19-37 (Winter, 1959).

5. Article 92.

6. Briggs, page 305. Quoted from Hudson, *op. cit.* 471. *Cf.* J. H. W. Verzijl, *Affaire relative à Certains Emprunts Norvégiens*, 4 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 382 (1957).

7. Pages 305-6.

8. Article 36(1), Statute of I.C.J.

if the other party refers the dispute to the court . . ."[9]

With regard to the Connally Reservation, Professor Kelsen, referring to the phrase "as determined by the United States of America", states: "This interpretation of Article 36 of the Statute in connection with Article 2, paragraph 7, of the Charter (restricting U. N. intervention in domestic affairs), implies that a party to a dispute before the court, in spite of its declaration to recognize as 'compulsory' the jurisdiction of the court in all legal matters, may withdraw any such dispute from . . . the Court by declaring it as . . . a matter which is essentially within its domestic jurisdiction: *which is just the contrary of compulsory jurisdiction*".[10]

Although most of the thirty-nine states accepting the court's compulsory jurisdiction have found it unnecessary to exclude matters of domestic concern, advocates for repeal of the Connally Reservation are not too much bothered by its provision excluding United States domestic matters from the court's jurisdiction. Because the court is limited by the charter and by the statute, and because the kinds of international legal disputes with which the court may deal are enumerated, this portion of the reservation is regarded merely as the re-statement of a condition of jurisdiction which already exists. The repugnant part of the Connally Reservation is our Government's insistence that the United States alone shall *determine* the question of jurisdiction. Surely, on this point, the question must be asked: Is it ever good law to permit an interested party to judge its own case?

Hans J. Morgenthau, then, spots the *real* purpose of the Connally Reservation:

> Since what is and what is not "essentially" within the domestic jurisdiction of the United States is thus a matter of political opinion and since according to (the) reservation . . . the opinion of the United States will decide this issue without appeal, the United States will be able, if it so wishes, by virtue of (the) reservation alone to exclude from the jurisdiction of the Court most disputes to which it might be a party. Even if the opinion of the United States in this respect were clearly arbitrary and without factual foundation, the terms of the declaration make the United States the final judge in the matter.[11]

Since the World Court is forestalled from intruding upon the domestic sphere, the *Wall Street Journal*'s assertion that the United States Constitution gives our citizens individual rights which in the United Nation Charter, the Covenants on Human Rights, and the laws of many nations "are either not found or are strictly limited", is not directly or significantly related to the repeal of the Connally Reservation. The *Wall Street Journal* confuses two different questions here.

But, we may ask, what about the accuracy and merit of the *Wall Street Journal*'s assertion on this score, taken by itself? What *is* the relationship between the constitutional rights of American citizens, and the United Nations Charter, the Covenants on Human Rights, and the laws of other nations? To what extent can treaties control domestic personal rights? Just how limited and weak are the documents and laws referred to?

The U. N. Charter (it is so) certainly does not contain—and was not intended to—a definitive set of rights similar to those in the United States Bill of Rights. The United Nations is not a superstate, though it does possess a kind of "entity" and international character. Neither is the United Nations a supranational organization or world government. It is an *inter*-national organization composed of eighty-two independent sovereign members, each of whom (for good or ill) is as much concerned with national sovereignty as is the United States. The United Nations is actively concerned with reaffirming "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small", and with promoting "social progress and better standards of life in larger freedom".[12]

The United Nations does not, however, attempt to legislate directly and impose upon its members anything. It works with and through its members. We must look to the members for performance and results. The United Nations will be as successful as its members make it.

Edmond J. Clinton is President and General Manager of a group of cafeterias in Los Angeles which have become famous for their unorthodox marketing policies. In addition to a full schedule of business and civic service, he is a part-time student at the University of Southern California and hopes to enter its law school.

The United Nations Human Rights Commission has long been working to secure for "all members of the human family" rights which "derive from the inherent dignity of the human person". It has produced two draft covenants on human rights which deal with (1) civil and political rights, and (2) economic, social and cultural rights.

The Draft Covenants on Human Rights have been before the General Assembly since 1954. They are still the subject of controversy, debate and revision. The Covenants are proposed treaties based on the non-legal, non-binding Universal Declaration of Human Rights which was adopted by the Assembly without a dissenting vote on December 10, 1948. The Covenants, though, are more detailed than the Universal Declaration in spelling out individual human rights.

The twenty-one rights contained in the Covenant on Civil and Political Rights "are similar in substance . . . to those in the constitutions of the United States and many other countries".[13]

The Covenant on Economic, Social and Cultural Rights contains eleven "rights" articles which "follow the general pattern of the Universal Dec-

laration, but they are far more detailed".[14] The language of these articles "reflects the concept that the state recognizes everyone should have a certain right, but does not declare that everyone has the right in fact. The phrasing ... takes account of the fact that these rights cannot be made immediately effective by legislative and judicial action..."[15]

The Universal Declaration of Human Rights, the earliest of the "rights" documents, contains thirty articles which cover the whole field of human rights. It serves only as "a common standard of achievement for all peoples and all nations..." Even so, it has enjoyed a noteworthy influence—including an impact on resolutions of United Nations organs, and on the constitutions, laws and judicial decisions of many countries. "For example, many of the nations to emerge to independence since 1948, such as Nepal, Morocco, Indonesia and Libya, have included provisions of the Declaration in their constitutions".[16] Also, it has influenced "the constitutions of ... Costa Rica, Syria, El Salvador, Haiti, Jordan, the Federal Republic of Germany, and Puerto Rico; the instruments relating to Eritrea ... and Somaliland; the peace treaty with Japan; and the legislation of several other states".[17]

Dag Hammarskjold, whose vision is good, sees in the light of the ideas and ideals reflected in the Declaration that "our present time calls for self-searching and self-criticism from all of us, and in all nations. No one, no country, has a monopoly on rightness, liberty and human dignity..."[18]

The *Wall Street Journal* overlooks the fact that the Draft Covenant on Civil and Political Rights does include "the right to freedom of expression",[19] "the right of peaceful assembly",[20] and an extensive list of legal rights and safeguards which could be warmly endorsed as according closely with many of the finest principles and procedures in our own law.

Still the *Wall Street Journal* sees as "already in jeopardy" the rights of our citizens because treaties can now supersede Article VI of the U. S. Constitution, which declares:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land...

As to the effect of treaties on national rights, some state court decisions in the United States are in conflict, and the United States Supreme Court has yet to speak more definitively about the effect of certain United Nations Charter provisions relating to "human rights and fundamental freedoms" on the rights of citizens under the Constitution and laws of the United States.

The Charter of the United Nations is, of course, a treaty. The preamble and certain articles (notably 55 and 56) set forth the obligation of member states to "take joint and separate action in cooperation with the Organization for the achievement of ... higher standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

An important segment of expert opinion is of the view that these sections serve to reflect the purposes and objectives of the organization, involving the moral commitment of its members; but that they are not legally self-executing statements of existing rights cognizable in federal and state courts in the absence of supporting legislation enacted by Congress.

Charter provisions relating to such items as the privileges and immunities of U. N. officials would appear to be of the self-executing variety.[21]

A fertile time lies ahead in which many unresolved legal-treaty questions will need to be answered—questions which spring from a world in dramatic, revolutionary, inevitable change. The answers will come one by one, as actual cases are considered, decided, appealed, reversed, appealed again, and ultimately (though not necessarily *permanently*) resolved. Thus, a growing, progressing, ever more comprehensible body of law will develop to meet changing conditions. This is the way mankind has always developed law. And we must keep a measure of faith that courts adjudicating issues of constitutional and international law are proper organs to determine the rules.

Returning to the Covenants on Human Rights, the late John Foster Dulles, testifying against the Bricker Resolution before a subcommittee of the Senate Judiciary Committee in 1953, announced that the Covenants would not be signed by the United States when completed, nor submitted to the Senate for ratification. This amounted to a reversal of the position of the previous administration. "The present administration", he said, "intends to encourage the promotion everywhere of human rights and individual freedoms, but to favor methods of persuasion, education, and example rather than formal undertakings. . ."[22] A few days later, Mrs. Oswald B. Lord, U. S. representative, told the U. N. Human Rights Commission that "it seemed wise to press for the achievement of the standards of the Declaration through ways other than the proposed Covenants, that there was 'a grave question' whether completion and ratification of the Covenants was the 'most desirable method' of advancing human rights..."[23] This came as "a bombshell", according to the chairman of the commission.

The Covenants contain two features which might well have ameliorated the "grave question" concerning their use.

(Continued on page 213)

9. Hans Kelsen, THE LAW OF THE UNITED NATIONS, New York, Frederick A. Praeger, Inc., 1950, pages 516-23.

10. *Ibid.*, page 529. Italics supplied.

11. Hans J. Morgenthau, POLITICS AMONG NATIONS, New York, Alfred A. Knopf, 1954, page 265.

12. Preamble of Charter.

13. James F. Green, THE UNITED NATIONS AND HUMAN RIGHTS, Washington, D. C., The Brookings Institution, 1956, page 43.

14. *Ibid.*, page 45.

15. *Ibid.*, pages 44-5.

16. BULLETIN OF THE AMERICAN ASSOCIATION FOR THE UNITED NATIONS, October, 1958, page 4.

17. Green, page 36.

18. UNITED NATIONS REVIEW, January, 1959, page 16.

19. Article 19(2).

20. Article 20.

21. For an excellent survey and discussion of the treaty power, Bricker Amendment, and human rights and domestic jurisdiction, see *Review of the United Nations Charter*, Senate Committee on Foreign Relations, Subcommittee on the United Nations Charter, 83d Congress, 2d Session, Sen. Doc. No. 87; and *Review of the United Nations Charter*, Compilation of Staff Studies Prepared for the Use of the Subcommittee on the United Nations Charter of the Committee on Foreign Relations, 83d Congress, 2d Session, Sen. Doc. No. 164.

22. Green, page 63.

23. *Bulletin of the A.A.U.N.*, October, 1958, page 5.

Books for Lawyers

THROUGH THE COURTROOM WINDOW. *By Judge Charles S. Desmond. St. Paul, Minnesota: West Publishing Company. 1959. $5.00. Pages 256.*

In this volume, the author, a successor to the seat of Cardozo on the highest court of New York, describes some of the unusual cases recorded in the reports of that important tribunal. Such a survey could not help proving to be extremely interesting to his readers, for, as he aptly remarks, lawsuits are stranger than fiction. Judge Desmond disclaims for his book any "profundity, legal learning or felicity of style". But this modest estimate is not justified by the facts. No errors of law are noticeable in his discussion of an extensive gamut of cases involving various legal principles; and his presentation of the cases is always clear, concise and colorful.

Major emphasis is appropriately given to an analysis of murder cases. One of these, *People* v. *Gillette*, 191 N. Y. 107 (1908), was the basis of Theodore Dreiser's novel *An American Tragedy*. (For a similar case in Pennsylvania, see *Commonwealth* v. *Edwards*, 318 Pa. 1 (1935)). But other out-of-the-ordinary situations are also portrayed, such as assault by automobile, insanity resulting from a transfusion of the wrong type of blood, death by fright of a farmer forced by an escaped convict to give him a lift in a truck, neurosis resulting from being scratched by a cat at a cigar store counter, rape on a roof traced by a foreign coin left there by the assailant, and many kinds of unusual cases.

Judge Desmond's volume is somewhat similar in nature to Francis L. Wellman's *Gentlemen of the Jury* and Simon N. Gazan's *Trial Tactics and Experiences*. This reviewer found the book so gripping that he could not lay it down until completed, in the early morning hours, after a wearisome day spent charging a grand jury and hearing argument in a long list of cases. Other readers will probably experience the same fascination.

EDWARD DUMBAULD
Uniontown, Pennsylvania

SO YOU WANT TO BE A LAWYER. *By William B. Nourse with Alan E. Nourse, M.D. New York: Harper & Brothers. 1959. $2.75. Pages 184 including Index.*

This little volume seems to me by all odds the best book for the college or high school vocational guidance counsellor to keep at his elbow and to lend to any young person contemplating the profession of law as his or her life work.

It stresses the stern discipline of the law; it promises no pot of gold at the end of the rainbow; it does speak warmly and even enthusiastically of the happiness and satisfaction which the lawyer finds in his work.

The dedication is arresting:

> To the memory of Rebecca Nurse ... whom lawyers would have saved (Executed as a witch in Salem, Mass., July 19, 1692)

The authors are Rebecca's tenth-generation grandchildren!

Although I have been trying to read everything worthwhile about the profession during my years of practice and especially during the last ten years I found this invaluable book by chance and in a roundabout way.

The October 17, 1959, issue of *The Saturday Evening Post* contained an article by Dr. Alan E. Nourse entitled "The Changing Role of the Family Doctor". He believes in the necessity for group practice and the specialization which it makes possible but asks if group practice must destroy the wonderful virtues of the family doctor—the friend, counsellor, and general diagnostician. Because these are vital questions for the Survey of the Legal Profession I wrote him and in his reply he told me of the book written by his brother, a practicing lawyer in Spokane. So I bought the book, read it with enthusiasm, and asked Dr. Nourse if he and his brother were related to Rebecca.

As this review is written primarily for lawyers who are keenly interested in legal education I can best give the savor of the book by direct quotation with a minimum of comment by myself. Naturally the emphasis of the book is on prelegal education and that is what makes it so valuable to us as well as to prospective lawyers.

> Probably no other profession in the world is so poorly understood as law, yet no profession plays a more important role in our society ... [page 12]. We can agree that without law we would certainly not have any lawyers. But it is equally true, in our modern civilization, that without lawyers we would not for long have any law! [page 27]...
>
> The relative costs of college and law school vary a great deal ... In general terms, however, you can expect to spend between fifteen hundred and two thousand dollars per year if you attend a private college away from home, adding up to a total investment of approximately ten thousand dollars for the cost of your legal education ... [page 56].
>
> Unfortunately ... the would-be lawyer actually faces his greatest struggle after his formal legal education is finished... He very soon discovers that there is a tremendous gap between law as it is taught—in theory— ... and as it is practiced—in fact... [page 57].
>
> There is no other calling in the world which taxes an individual's moral responsibility and honesty more than the profession of law [page 61].
>
> It may seem paradoxical that very few schools of law prescribe any specific courses at all for prospective lawyears as "required" material in prelaw. This is quite a different picture from premedicine [page 68].

The author quotes the *objectives* of prelegal education as summed up by the Association of American Law Schools and published in the October, 1953, issue of the AMERICAN BAR ASSOCIATION JOURNAL. The author says *all courses* are relevant because the law is

all-embracing and the more the student learns the better lawyer he will be (pages 70-72). "And in the long run the *quality* of your prelegal education is of far greater importance than its *content*" (page 73).

> There is one non-theory course, however, that I would strongly recommend... Make a place for a typing course in your pre-law curriculum! [page 79].
>
> But the pre-law student often misses this helpful feeling about his pre-law courses. He just can't see how his studies are getting him any closer to his goal, the study of law [page 81].
>
> There are sound reasons for our state colleges and universities to give certain students with questionable scholastic records a chance to study law. Part of the reason lies in the highly democratic traditions of our public colleges... But more important is the recognition among legal educators that there are many different personal qualities which may be useful in the legal profession, and that these qualities may not necessarily be demonstrated in college grade averages [page 91].
>
> The universal standard of recognition among law schools in the United States is the approval of the American Bar Association [page 93].
>
> What About Night Law Schools? ... Night law schools are popular. In many ways they are necessary... Today the approved night law schools are anything but makeshift... But the unapproved night schools each fall short in one or more of the standards set up by the American Bar Association [pages 94, 95].
>
> Starting classes in law school is like walking into a different world... You will be leaving the more or less easy-going ways of college behind you, and quite abruptly plunging into a completely new atmosphere [page 99].
>
> There is probably no solution to this initial feeling of confusion, but it may help to know that if you survive the rigors of your first year of law school you have passed one of the major obstacles in your legal education [page 113].
>
> For the first time in your school experience you will feel a really strong bond of fellowship with your classmates... Your school will very probably be a member of the American Law Student Association [page 114].
>
> [On graduating from law school] you will realize now that you are entering a profession that will demand conscientious work, scrupulous honesty, and dedicated service [page 132]. You still face a major barrier ...; you must pass bar examinations [page 133].
>
> The bar examinations actually do just one thing: *they weed out incompetents*. The chief reason that so many students fail them is simply that recognized law schools are still turning out students who are incompetent to practice law [page 136]. The prospective lawyers who pass bar examinations are the ones who can *express what they know*, however much or little that may be [page 145].
>
> [As to starting in practice] you will not "feel like a lawyer" in the early months of practice in the way that a new physician "feels like a doctor". There is nothing in law which really compares with the new doctor's internship, perhaps for the simple reason that there is nothing in law which quite compares with a hospital [page 149].
>
> Probably the most successful type of association for a beginning lawyer is to join an already established law firm or office. Here you would share in the work performed for established clients of the office, under the close supervision of an experienced attorney. Certainly the process of learning by experience is more rapid under these circumstances than in solo practice [page 154].

As to the climactic and summit session in the courtroom of the Supreme Court of the jurisdiction the author states (pages 146, 147), "You will remember the ceremony as long as you practice law." He then recites the Oath of Admission in the form adopted by the American Bar Association and which, with minor changes, has had universal acceptance, and concludes:

"Your own oath of attorney may differ somewhat in the words, but the intent and high ethical calling of the profession is the same in any of these United States."

REGINALD HEBER SMITH
Boston, Massachusetts

EHRLICH'S BLACKSTONE. *Edited and abridged by J. W. Ehrlich. San Carlos, California: Nourse Publishing Company. 1959. $15.00. Pages 987.*

It is a wonder that no one thought of this before; or perhaps it was thought of, but no one had the patience or took the time to do it. For here is Blackstone in modern English, shorn of the pedantic footnotes which have long since lost their significance, lifted out of the morass of black letter printing and grammatical involutions, abridged to manageable proportions by the elimination of digressions which no longer lead anywhere if they ever did, with the Latin tags and quotations translated for the convenience of our monolingual generation, and the whole paragraphed, headnoted, indexed and cross-indexed so that its magnificient and unchanging philosophy of the law can be readily related to our modern problem of preserving the traditions which it did so much to initiate and establish. Who could ask for anything more? Or at least who, among those who seek the occasion to take their Blackstone off the shelf and value it for something more than the fine binding and quaint typography, could ask for a better opportunity to do so? I for one am grateful to Mr. Ehrlich for making me do something I should have done long ago, and making me enjoy doing it.

For when it is released from its encrusting obscurities, the brilliance of Blackstone's thought and language remains undimmed by the two centuries which have passed since he assumed the chair as Oxford's first teacher of law. True, he lacked the qualities of the successful advocate; but his genius for insight and analysis afforded him an opportunity which no advocate, concerned with the merits of a single case could rival to synthesize the principles of the English common law. Mr. Ehrlich has seen fit to omit (and properly so, for today it would be whipping a dead horse) Blackstone's lengthy defense of the teaching of law in universities. But there is one paragraph, dealing with the situation of those who because of their concentration upon practice at the expense of principle, fail to see the legal forest for the trees, that seems so pertinent to why we need Blackstone (or his equivalent) today that it is worth quoting:

> Making therefore due allowance for one or two shining exceptions, experience may teach us to foretell that a lawyer thus educated to the bar, in subservience to attorneys and solicitors, will find he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract

and bewilder him: *ita lex scripta est* ["the law has been so written", Mr. Ehrlich would translate] is the utmost his knowledge will arrive at; he must never aspire to form, and seldom expect to comprehend, any arguments drawn *a priori* [would even Mr. Ehrlich feel the need to translate?], from the spirit of the laws and the natural foundations of justice.

You will not find this paragraph in Mr. Ehrlich's book; but its spirit pervades and motivates what he has done. That a book which in abridged form occupies nearly a thousand pages needed abridgment is self-evident; that a book the most recent parts of which lack only a decade of two centuries in age needed editing is equally apparent; but that what remains after abridgment and editing is still the most brilliant treatise ever propounded on human rights and their protection through law is little short of a miracle. We owe a renewed debt of homage to Blackstone, and of thanks to Mr. Ehrlich for making his great work so readily available to us.

WALTER P. ARMSTRONG, JR.
Memphis, Tennessee

ALL IN ONE LIFETIME. *By James F. Byrnes. New York: Harper and Brothers. 1958. $5.00. Pages 432, including index.*

This is something more than an autobiography. It is the faithful and entertaining, yet strikingly modest record of a one-time skilled court reporter, witness to words and deeds of great men who made vital pages in American history. The style is simple and graphic. The book is well arranged and indexed. It will be ready reference beyond the days when its accomplished author will be praised and assailed politically.

This reviewer recalls no other man in American history since the days of Jefferson who has filled offices of equal dignity and responsibility in the legislative, executive and judicial branches of the Federal Government. The record of Judge Byrnes is fantastic—Congressman, Senator, Justice of the Supreme Court, Director of Economic Stabilization, Secretary of State and Governor of South Carolina. His views were entertained by Woodrow Wilson, Franklin D. Roosevelt, Harry Truman, even President Eisenhower. It may well be deduced that but for his Catholic baptism if not his Southern nativity, he would have been Vice President, and, by President Roosevelt's death in office, he would have been President. If Justice Byrnes had remained on the Supreme Court of the United States until the School Segregation Cases were considered, it is fair to assume he would have cast a dissenting vote, modified or even changed the court-made policy on segregation.

It was Senator Byrnes' introduction and sponsorship of an amendatory act of Congress in the Senate and the work before the Conference Committee that paved the way for General Marshall to approve General Eisenhower's promotion over 366 senior officers.

Lawyers who want to read the unbiased report of men and events who shaped the course of this country for the past fifty years should read this book.

HERBERT U. FEIBELMAN
Miami, Florida

CIVIL LIBERTY IN SOUTH AFRICA. *By Edgar H. Brookes and J. B. Macaulay. New York: Oxford University Press. 1959. $3.00. Pages iii, 175.*

"This is not a polemical book," according to the authors in its Preface. "We leave the facts to speak for themselves." They are eloquent; and they show what happens to a land when the things which we have sometimes feared have become realities.

Here are only a few examples. Search without warrant is widely authorized in South Africa. See Section 44(2) of the Criminal Procedure Act of 1955. Racial discrimination is not merely allowed; it is enforced, with an almost unbelievable ingenuity. Persons may be banished from their homes, or confined to small areas, or forbidden to attend meetings, by the unreviewable action of a government minister. The only recourse that the banished or restrained person has is that the minister must, on request, state his reasons, "and so much of the information which induced the Minister to issue the notice as can, in his opinion, be disclosed without detriment to public policy." Section 10(1)(b) of the Suppression of Communism Act, 1950, as amended by Act. No. 15 of 1954, §7.

Interdicts, or injunctions, are forbidden in many cases, thus effectively denying what we would call the writ of habeas corpus. It is illegal to leave the country without a passport; yet "An applicant for a passport has no redress if refused... Recourse to the courts is not open since a refusal rests in the complete discretion of the Minister." As the authors say (page 70), "This legislation contains a terrible potential as a weapon against political opponents. Small wonder that the voice of many South Africans is stilled in criticism of their government."

There is more and more. "Any person who ... uses any language or does any act or thing calculated to cause any person or persons in general, to commit an offence by way of protest against a law, or in support of any campaign for the repeal or modification of any law" is liable on conviction to fine, imprisonment, or whipping, or, indeed, to any two of these three. Section 2(b) of the Criminal Law Amendment Act, 1953. "Small wonder that the enactment of this law has caused the press and individuals to be extremely guarded in their protests" (page 78). The Minister of Labor is empowered to prescribe "the reservation ... of work or any specified class of work ... for persons of a specified race or for persons belonging to a specified class of such persons." Section 77 of the Industrial Conciliation Act, 1956. This principle has been widely applied and is "held *in terrorem* over thousands of non-European workers" (page 98).

There are chapters on "Religious Freedom", "Social Freedom", and "The Franchise". All tell the same sad story. Since the book was published the government has enacted new laws barring non-Europeans from the few established universities which had admitted them, and removing the last vestiges of franchise which had been allowed to non-Europeans. As the authors say in their conclusion (page 167), "Even to those used to these conditions, the effect of marshalling them in order is devastating: the heart seeks almost desperately for some ray of hope, some dawn of freedom."

South Africa has no constitutional Bill of Rights. "Not only because they believe in apartheid, but also because they do not very much believe in freedom, many South Africans are glorifying 'strong' government, or at least accepting without demur the cult of the political Messianism of Ministers" (page 168). The lesson for Americans is how important it is to have fundamental rights placed beyond legislative power—how important it is that we very much believe in freedom. Another thought keeps recurring as one reads this book: what a wonderful world this would be if we all, everywhere, really believed in due process of law and the equal protection of the laws.

ERWIN N. GRISWOLD
Cambridge, Massachusetts

VERDICT FOR THE DOCTOR, THE CASE OF BENJAMIN RUSH. *By Winthrop and Frances Neilson. New York: Hastings House, Publishers. 1958. $4.50. Pages 236.*

The authors have combined an interesting discussion of early American history and political developments with the background and trial of a famous case, namely, an action brought by Dr. Benjamin Rush, of Philadelphia, world famous physician and signer of the Declaration of Independence, against William Cobbett, a newspaperman who styled himself "Peter Porcupine". Libel was the basis of the cause of action. The trial opened on Friday morning, December 13, 1799, in the State House in Philadelphia, before twelve jurymen and three Judges of the Supreme Court of Pennsylvania.

It is reported that an epidemic of yellow fever broke out in August, 1793, when Philadelphia lay in the grip of a heat wave. It is indicated that some four thousand individuals died in that city during the epidemic and thousands of other inhabitants fled the city. Dr. Rush, a practicing physician, stayed behind and attended the stricken. It appears that the old medical remedies had proved valueless in arresting the effects of the dreaded disease. The Doctor had worn himself out looking after the sick when he came upon what he considered a cure, by copious bleeding and purging, which he adopted and claimed to have cured 80 per cent of his patients as a result. However, while Rush thought he was saving lives, Cobbettt claimed he was "butchering" helpless victims and published a series of articles in *Porcupine's Gazette*, attacking in very strong terms, not only the new cure but also Dr. Rush himself.

It appears that Cobbett's motives were not strictly humanitarian, but were primarily political as he was then a strong supporter of King George III and the Federalist Party and, it is indicated, they almost succeeded in turning us British again. Dr. Rush, although conservative himself, was a rebel in medicine, a democrat, and a lifelong friend of Thomas Jefferson. Rush insisted on bringing the suit, although advised against it partly for political reasons. Arguments at the trial were primarily levelled at the question whether or not Cobbett's attacks on Dr. Rush were privileged under "the freedom of the press" as provided in the Constitution of the United States.

The authors point out that by curious coincidence, the decade ending was almost exactly bracketed by the deaths of Benjamin Franklin on April 17, 1790, and of George Washington on December 14, 1799. This ten-year period, during which Philadelphia was the capital of the nation, was a crucible period in the life of the new United States. It was a shakedown period. The two-party political system had emerged, the Federalists under the leadership of Alexander Hamilton, who desired that strong central powers be vested in the Federal Government, and the group who became known as "Democratic-Republicans" under the leadership of Thomas Jefferson. This latter group wanted less power vested in the Federal Government and more reserved to the people at the local level. These were years of the French Revolution, foreign intrigues, and the Alien and Sedition Laws. It was a decade of bitter personal controversies, leading off with Hamilton and Jefferson, when political differences grew into feuds and made enemies of neighbors. During this period in the Quaker City of brotherly love there were slanders, libels, half-truths flaunted in the newspapers and violent verbal campaigns.

The authors state: "Out of the maelstrom sprung one of the strangest trials ever to come before an American court. One of its lawyers called it the most important case ever presented to a jury. The causes were national. But the quarrel between a Philadelphia physician and the newspaperman who styled himself Peter Porcupine had turned for both men into an all-out battle for personal survival."

The medical theories of Dr. Rush became involved in politics when Alexander Hamilton, then Secretary of Treasury, wrote a letter to the College of Physicians which was printed in every newspaper in the City of Philadelphia. In this letter Hamilton was strongly critical of the methods used by Dr. Rush in treating his patients. Hamilton, who had been ill, described his illness, how he had been cared for and recovered under the treatment of Dr. Stevens who used bark, wine and spirits, instead of the methods by Dr. Rush. This was a devastating repudiation of Dr. Rush made by a major officer of the United States Government and leader of the Federalist Party. Rush charged that through the publication of the letter the public was confused on his new and efficient methods of treating yellow fever and he stated, "Colonel Hamilton's letter has cost our City several hundred inhabitants."

By the time of the yellow fever epidemic in 1793, the Hamilton-Jefferson quarrel had grown into an insoluble stalemate. Hamilton, as Secretary of the Treasury, offered fiscal policies for the Government which Jefferson opposed. Jefferson, who was Secretary of State at the time, was in favor of the French Revolution which Hamilton strongly opposed. It appears that the two men were so divided in their positions that Washington himself could not reconcile their differences and their hatreds.

Cobbett, through his newspaper, *Porcupine's Gazette*, became a strong supporter of Alexander Hamilton's policies as the leader of the Federalists. John Adams, a Federalist, was elected as the second President of the United States in 1796 with a majority of three votes over Thomas Jefferson. In those days the runner-up for President became Vice President.

In the opening statement at the trial, counsel for Dr. Rush, among other things, stated: "This day we are to know whether character is deemed a valuable and sacred possession among us, in which we have a perfect and inviolable right, or whether it is to be the sport and plaything of malicious ridicule and vulgar wit, the undefended victim of assassinating malevolence. When an offender is found hardy enough to assault the sacred fortress of *reputation* and strive to prostrate it in the dust, hardy enough to brave the vengeance denounced against him by God and man, he should be struck with dreadful and speedy justice, and stand a blighted picture of ruin and infamy. Such an offender, we assert, is William Cobbett, and if such an offender we show him to be, we trust that such a punishment awaits him!"

Counsel for the defense, in the opening statement, defined the issue in the case from the defense standpoint. The defense took the position that the question was not whether the plaintiff was a physician of eminence, a peaceable citizen, a good father or a tender husband, but rather whether the publications cited in the declaration and read to the court, the defendant was motivated by a design to injure Dr. Rush in his personal character and as a physician, or to run down and laugh out of countenance a practice which he considered mischievous. The counsel continued, "The verdict must be based on one of these alternatives. . ."

Although the news did not reach Philadelphia for several days, it is interesting to note that on Saturday morning, which was the second day of the trial, General George Washington lay seriously ill at Mount Vernon with a septic sore throat. Three doctors were in consultation on his case and a decision, by the majority vote of the doctors, was to continue bleeding the General. In all, he was bled four times during that day. By ten o'clock that night General Washington lay dead, to the intense grief of the entire nation. Inevitably, and forever afterwards, the name of Dr. Benjamin Rush was to be connected with the blame, in that he was the leading advocate of bleeding as treatment.

At the conclusion of the trial the Chief Justice instructed the jury that in English libel cases the only task of the jury was to judge of the fact of publication and its truth, whereas the Court, as judges of the law, decided whether the paper amounted to libel or not. The Judge explained: ". . . a libel as defined by the law was the malicious defamation, expressed either in printing, writing, or by signs or pictures tending to blacken either the memory of one who was dead or the reputation of one who was alive, or to expose him to public hatred, contempt, or ridicule. In a civil suit the damages were to be assessed by the jury." The Judge also instructed the jury: "The counts laid in the declaration are fully proved by the publications, which are certainly libelous." The Judge also pointed out that the liberty of the press is a valuable right in every free country, and should never be unduly restrained, but when it is perverted to the purposes of private slander it becomes a very destructive force in the hands of unprincipled men. He stated that the utmost purity and integrity of heart is no shield against the shafts and arrows of malice, conveyed to the world by printed publications. He pointed out that every person availing himself of the liberty of the press *should be responsible for the abuse of that liberty*, thus securing to our citizens the invaluable right of reputation against every malicious invader of it. The crowd in the courtroom hearing the Judge's instructions, was suddenly filled with a consciousness that this trial was indeed a test of American principles, far exceeding in meaning the personal conflict of two men.

After two hours of deliberation the jury returned to the courtroom in the presence of the Judges and spectators who filled the room to capacity. The verdict of the jury was in favor of Dr. Benjamin Rush, in the sum of five thousand dollars.

Dr. Rush was the city's hero. It appeared that liberty in America was to have a more universal meaning for all its citizens than they had dreamed.

William Cobbett later returned to England where he continued his political activities, including, in some instances, attacks upon the British Government through his own publications. He died in 1835 at the age of 72, a member of Parliament. In Philadelphia his name disappeared from people's memories. The judgment obtained in the lawsuit by Dr. Rush had been paid. In the course of a few months the persecutions against Dr. Rush were neglected and forgotten: "Scandal dies sooner of itself than we could kill it."

After the year 1800, Dr. Rush became recognized as a leading physician in America. He was a great teacher and, from his post at the University of Pennsylvania, passed on his system to eager pupils. He was responsible for the medical education of more than three thousand physicians. They carried the practice of his theories to every part of the United States. He was the first American physician to cast out old theories and to adopt new ones. Also he can be classed as the first true American psychiatrist. In 1812 Dr. Rush published his book on *Medical Inquiries and Observations upon the Diseases of the Mind*. This book apparently remained a standard authority for about seventy years.

John Adams and Thomas Jefferson, who had quarreled long before over differences of political opinion, were reconciled by Dr. Rush by letter writing among the three men. Dr. Rush died on April 19, 1813. Eulogies flowed in from across the land and from across the seas. Among the tributes were those from two former presidents of the United States, John Adams and Thomas Jefferson.

Thomas Jefferson wrote to John Adams: "Another of our friends of '76 is gone, my dear sir, and another of the co-signers of the Independence of our country. And a better man than Rush could not have left us, more benevolent, more learned, no finer genius, or more honest."

John Adams said of his friend: "As a man of science, letters, taste, sense, philosophy, patriotism, religion, morality, merit, usefulness, taken altogether, Rush has not left his equal in America; nor that I know of in the world."

An interesting, informative book, written in a descriptive manner, which is well worth reading.

RAYMOND COWARD
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COMPARATIVE LAW. *Second Edition. By Rudolf B. Schlesinger. Brooklyn: The Foundation Press. 1959. $11.00. xviv, 635.*

The international realignment which took place after World War II may be the reason for the remarkable increase of comparative law interest in this country, and the corresponding fact that quite a few publications related to that special field of legal research and education were brought out here in a relatively short period of time. In 1950, Professor Schlesinger, an eminent civil law expert, gave birth to the first edition of that pioneer book, the second and greatly revised edition of which is the subject of this review. A series of most interesting lectures, delivered by a distinguished British scholar, Professor F. H. Lawson, at the University of Michigan law school, was in 1955 published under the significant title, *A Common Lawyer Looks at the Civil Law*. There followed, in 1956, a noteworthy symposium, brought out by the New York University's Institute of Comparative Law under the heading, "The Code Napoleon and the Common Law World". A book similar in purpose and arrangement to that of Professor Schlesinger, though in some respects different from it, is Professor Von Mehren's profound work, *The Civil Law System, Cases and Materials for the Comparative Study of Law*, which appeared in 1957. The year 1958 saw the publication of a relatively modest, but interesting contribution to the same branch of legal studies, a book entitled *The French Legal System, An Introduction to Civil Law Systems*, jointly authored by René David, a French scholar, and Henry P. de Vries, a member of the law school faculty of Columbia University. It would seem, however, that the latest arrival in this array, the second edition of Professor Schlesinger's book, while not depriving the others of their values and continuing usefulness, is not only most up-to-date with regard to the material included, but also top-ranking as a guide, in book form, to the understanding of the comparative method and of foreign laws by an American with only American legal background.

While we do not intend to particularize the rich harvest that may be gathered from the material and the penetrating thoughts offered by Professor Schlesinger, certain general observations must be made about the contents of his book. It does not attempt to present, even in bird's-eye view, a complete picture of the civil law system, or of any foreign law. It is, however, exhaustive in discussing comparative law methods and tools and offers a good selection of illustrative foreign law materials, being in this respect in the nature of an anthology. Equally interesting, but different, selections are contained in Professor Von Mehren's similar book that has been mentioned before. It is therefore suggested that both could, with great profit, be used as if they were companion volumes. Whereas the first edition of the Schlesinger book relied heavily on textual material from other sources, the center of gravity of the second edition lies in his excellent own statements. The book contains, however, also valuable discussions by other authors, in addition to interesting legislative and case material. And it gains greatly in usefulness for practical purposes by its well-composed bibliographical index which lists the various items, books and articles, by grouping them into topical categories.

Of course, this book, despite its high qualities, is not perfect. It has certain shortcomings—or so the reviewer believes. For instance, it does not present a comprehensive outline of the fundamental differences between common law and civil law approach. Such an over-all survey, even if limited to elementary matters, but including both private and criminal law, is a must in a book of this kind. Only in so far as civil procedure is involved, is such a comprehensive orientation given by Professor Schlesinger in the form of his well-written "Fictional Dialogue concerning a Not-Too-Fictional Case".[1] The book does not attempt to clarify the relation between Roman law and the so-called civil law system, although the erroneous assumption that the two are identical has found wide distribution. And while it deals extensively with matters that could well have been omitted, such as proof of foreign law in American courts[2] and administrative law in Continental European countries,[3] it only incidentally and most sparingly touches on comparative criminal law. Although Professor Schlesinger is not isolated in this neglect, but has good company, it is regrettable that the most interesting vistas which arise from a comparative treatment of criminal law have been almost completely passed by him.

Not as an exhaustive list, but merely as examples of criminal law matters that are well apt for comparative treatment, the following may be mentioned: the relation between the civil law doctrine of *res judicata* and the common law theory of double jeopardy; the difference between civil law and common law jurisdictions, with regard to the employment, in criminal cases, of laymen, jurors or otherwise, as members of the fact-finding body; the paramount role which the presiding judge in a criminal trial in a civil law jurisdiction plays in the presentation of the evidence, at variance with the mainly umpire's role of the American judge; the abhorrence, in civil law countries, of anything in practical effect amounting to the granting of immunity to an accomplice in order that he may be used as "state witness" against his associates in crime, as compared with the quite different practice in this country; the legislative elimination, in civil law jurisdictions, but frequent indulgence in this country, of surprise tactics on the part of the prosecution; the merely legislative recognition, in civil law countries, of the privilege against self-incrimination, at variance with its constitutional guarantee in this country; finally, the unsworn statement made by

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1. Not quite correct, in this dialogue, is the statement (page 229) that "in civil law countries, the first appeal is on the law and facts." This is an unwarranted generalization, since it is not true, for instance, with regard to the Austrian Code of Civil Procedure, drafted by Franz Klein, a recognized leader in the field of legislative reform of procedural law. In Austria, as in this country, the appellate court is ordinarily bound by the trial court's findings of fact; it may not reweigh the evidence, but can disapprove the trial court's judgment only because of legal errors, nullities or essential defects in the proceedings, or inconsistency between findings and record *(Aktenwidrigkeit)*.

2. A subject that is sufficiently treated in American law school courses on civil procedure.

3. A matter which is given abundant consideration in political science departments.

a defendant in a trial in a civil law jurisdiction, and his freedom from criminal prosecution for any falsehood thus stated by him, as compared with the embarrassing situation in which the accused is placed in this country by the two horns of a dilemma, either not to testify at all or to testify under oath.

These critical remarks are, of course, not meant to detract from the previously submitted laudatory appraisal of the book. They are intended as constructive suggestions which may be considered in a future further revision of this outstanding contribution to the comparative law literature.

MAXIMILIAN KOESSLER
San Francisco, California

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New England Tour To Follow 1960 Annual Meeting

Plans are being completed for a motor tour of colonial New England following the Annual Meeting at Washington in September this year.

The tour will leave Washington by train to New York and the Waldorf-Astoria for a two-day program followed by a seven-day motor tour circling the New England states, with visits to the Roosevelt Estate at Hyde Park, West Point, Lake George, the White Mountains and beautiful Berkshires. A real eastern shore clambake will be enjoyed at a picturesque fishing town en route.

Memories of historical significance will be recalled by such familiar places as Concord and Lexington. "The Beeches", home of Calvin Coolidge, will be visited as well as Louisa May Alcott's Orchard House and the historic Wayside Inn, immortalized in Longfellow's poetry.

The brochure descriptive of this trip will be made available to members of the legal profession in England who will be in attendance at the Washington meeting and it is believed many of them may join the tour.

A more detailed report and schedule will appear in the March issue of the AMERICAN BAR ASSOCIATION JOURNAL, following which members who are interested can communicate directly with the travel agency which will handle the tour.

Review of Recent Supreme Court Decisions

George Rossman
EDITOR-in-CHARGE

Admiralty . . . *Jones Act*

Braen v. *Pfeifer Oil Transportation Co.*, 361 U. S. 129, 4 L. ed. 2d 191, 80 S. Ct. 247, 28 U. S. Law Week 4044. (No. 32, decided December 14, 1959.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Judgment of the Court of Appeals reversed and judgment of the District Court reinstated.*

This was a suit under the Jones Act, 46 U.S.C. §688, to recover for injuries sustained when a catwalk used to board respondent's barge gave way under the petitioner. The petitioner was the mate on the barge, but at the time of the accident he was on his way from the barge to lay new decking on a raft that was used in chipping, painting and welding on barges. The barge on which the petitioner worked was not being served by the raft at the time, although it had been so used in the past. The question for the Court was whether the Jones Act applied under these circumstances.

The Court's opinion, holding that the statute did apply, was written by Mr. Justice DOUGLAS. The statute applies, said the Court, when a person having "status as a member of the vessel" is injured "while in the course of his employment". Here the petitioner was certainly a "member of the vessel", and the Court went on to cite several cases which had allowed recovery for injuries sustained away from a vessel but while the injured was in the service of the vessel. The Court declared that it was immaterial that the raft which the petitioner had been assigned to repair was not being used to service his vessel at the time. He was acting "in the course of his employment" the Court held, for he was at that moment doing the work of his employer pursuant to orders.

Mr. Justice HARLAN, joined by Mr. Justice FRANKFURTER and Mr. Justice WHITTAKER, wrote an opinion concurring in part and dissenting in part. This opinion argued that the Jones Act did not apply to a crew member injured when the injuries arose out of activities not directly related to the affairs of his vessel or incidental to his shipboard work. Accordingly, the issue of liability, in this view, turned on whether petitioner was already engaged in his raft assignment or whether he was simply *en route* to the raft assignment. If the former, this opinion argued, then there was no liability; if the latter, then there was a question for the jury. Mr. Justice HARLAN declared that he concurred in the reversal of the Court of Appeals, but not in the reinstatement of the District Court's judgment.

The case was argued by Benjamin H. Siff for petitioner and by Edmund F. Lamb for respondent.

Admiralty . . . *seaworthiness*

West v. *United States*, 361 U. S. 118, 4 L. ed. 2d 161, 80 S. Ct. 189, 28 U. S. Law Week 4019. (No. 11, decided December 7, 1959.) *On writ of certiorari to the United States Court of Appeals for the Third Circuit. Affirmed.*

Here, the Court refused to hold that the United States was liable for the unseaworthiness of a ship undergoing complete overhaul in the course of being reactivated after several years in the "moth ball fleet".

The petitioner was a shore-based employee of the contractor who was overhauling the ship. He was injured while working inside the low pressure cylinder of the main engine when an end plug from a one-inch pipe in the water system was propelled against him as another employee turned on the water. The findings indicated that the plug was loosely fastened. Recovery was sought under the theory that the vessel was unseaworthy and that the United States was liable for not providing petitioner a safe place to work. The District Court denied recovery and the Court of Appeals affirmed.

Mr. Justice CLARK affirmed for a unanimous Supreme Court. The Court distinguished this case from *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946), and subsequent cases which have held that the warranty of seaworthiness applies to shore-based workers while on board ship doing the work traditionally done by seamen. The rationale of the *Sieracki* line of cases, the Court said, is that the shore-based worker is doing a seaman's work and incurring a seaman's hazards. Here, in contrast, the repair was undertaken precisely because the vessel was not seaworthy, and the work to be done was equivalent to "home port structural repairs". The workman here took his orders from the contractor, not the shipowner, who was not in control of the ship. "Here there could be no express or implied warranty of seaworthiness to any person", the Court declared.

The Court also refused to accept petitioner's argument that the United States had a nondelegable duty to furnish him with a safe place to work. The United States was not in control of the vessel at the time, the Court said, and the respondent, having hired the contractor to perform the overhaul and reconditioning was under no duty to protect the petitioner from risks that were inherent in carrying out the contract. The cases cited by the petitioner, the Court pointed out, all involved situations in which the shipowner was in control of the vessel at the time of the injury.

The case was argued by Abraham E. Freedman for petitioner and by Leavenworth Colby for respondents.

Reviews in this issue by Rowland Young.

Commerce . . . *railroads*

Minneapolis & St. Louis Railway v. *United States, South Dakota* v. *United States, Minnesota* v. *United States*, 361 U. S. 173, 4 L. ed. 2d 223, 80 S. Ct. 229, 28 U. S. Law Week 4027. (Nos. 12, 27 and 28, decided December 14, 1959.) *On appeals from the United States District Court for the District of Minnesota. Affirmed.*

These cases involved the efforts of rival railroads to obtain control of the Toledo, Peoria & Western Railroad, an independent "bridge carrier" of through east-west traffic, by-passing the congested Chicago area. The line is 234 miles long, running from its connection with the Pennsylvania Railroad at Effner, on the Illinois-Indiana line, to its connection with the Atchison, Topeka & Santa Fe at Lomax, Illinois. It has connections for the interchange of traffic with sixteen railroads.

In 1955, the Santa Fe and Pennsylvania Railroads applied to the Interstate Commerce Commission for approval of the purchase by them of the stock of the T. P. & W. (or, as the Court refers to it, "Western"). The Minneapolis intervened, objecting to the acquisition, as did the States of Minnesota and South Dakota. Later, the Minneapolis applied to the Commission for authority to acquire sole control of the T. P. & W., offering the same price and the same terms to the stockholders as did Santa Fe and Pennsylvania. Santa Fe and the Pennsylvania intervened in this proceeding, which the Commission consolidated with the original proceeding. Other railroads intervened, seeking authority to participate in the acquisition of T. P. & W. stock, and later the State of Illinois, eighteen towns in Illinois, and a number of other interested parties intervened in support of the Santa Fe-Pennsylvania application. The Commission held extended hearings, and finally decided in favor of Santa Fe and Pennsylvania, noting that they contemplated continued operation of the T. P. & W. "as a separate and independent carrier" and that all "existing routes and channels of trade . . . will be maintained and kept open without discrimination between connecting lines of railroad". The Commission found, on the other hand, that Minneapolis "unequivocally contemplates the disappearance of Western as an independent and neutral connection for the other 15 carriers . . ." The Commission found further that the Minneapolis plan would be "extremely harmful to other carriers" and that "public interest demands that the present policies of Western in all respects be continued". A three-judge District Court sustained the Commission's order, approving the Santa Fe-Pennsylvania application.

The Supreme Court affirmed, speaking through Mr. Justice WHITTAKER. The Court disagreed with Minneapolis that the Commission had improperly adopted at the outset the standard of "separate and independent management" for the T. P. & W., thereby depriving Minneapolis of "fair comparative consideration". The record showed, said the Court, that the Commission's governing standard was the "public interest", although it did ultimately find that continuance of the T. P. & W. as an independent line would best serve the public interest.

The Court also rejected the contention that acquisition of control of the T. P. & W. by Santa Fe and Pennsylvania would create a combination in restraint of trade in violation of the Sherman and Clayton Acts. The Court pointed to Section 5(11) of the Interstate Commerce Act, which empowers the Commission to relieve carriers from the antitrust laws. Although the Commission may not ignore the antitrust laws, the Court said, there is little doubt that Congress has authorized it to approve acquisitions that might otherwise be unlawful restraints of trade if it finds that such acquisitions are in the public interest. The Commission had given careful consideration to Minneapolis's antitrust arguments, the Court pointed out.

The Court rejected other arguments advanced by Minneapolis, declaring that "a thorough examination of the record" showed that the Commission had made adequate subsidiary findings on all material issues and that its ultimate findings supported the order and were in turn supported by substantial evidence.

Mr. Justice DOUGLAS dissented without opinion.

The cases were argued by Max Swiren and Harold J. Soderberg for appellants and by Robert W. Ginnane and Starr Thomas for appellees.

Constitutional law . . . *obscenity*

Smith v. *California*, 361 U. S. 147, 4 L. ed. 2d 205, 80 S. Ct. 215, 28 U. S. Law Week 4033. (No. 9, decided December 14, 1959.) *On appeal from the Appellate Department of the Superior Court of California, Los Angeles County. Reversed.*

This decision reversed a conviction under a Los Angeles ordinance which made it unlawful for "any person to have in his possession any obscene or indecent writing, [or] book . . . in any place of business where . . . books . . . are sold . . ." As interpreted by the California courts, the ordinance imposed strict criminal liability, regardless of an accused's knowledge of the contents of the book.

Speaking for the Supreme Court, Mr. Justice BRENNAN held that the ordinance, so interpreted, violated due process. While obscene speech and writings are not protected by the constitutional guarantees of freedom of speech and the press, the Court said, the ordinance's strict liability feature would tend to restrict the dissemination of books which are not obscene, and this is beyond the power of the state. If the bookseller is criminally liable without knowledge of the contents of the books in his shop, the Court reasoned, he will tend to restrict the books he sells to those he has inspected, and the public's access to reading matter will be restricted.

The Court limited its decision to holding that the state could not constitutionally eliminate all scienter in obscenity cases, refusing to pass on "what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock".

Mr. Justice BLACK wrote a concurring opinion which argued that the First and Fourteenth Amendments forbid any form of censorship. The plain language of the Constitution prohibits

it, this opinion argued, and neither the federal nor state governments have the authority to subordinate speech and press to what they think are "more important interests". "While it is 'obscenity and indecency' before us today", Mr. Justice BLACK observed, "the experience of mankind—both ancient and modern—shows that this type of elastic phrase can, and most likely will, be synonymous with the political, and maybe with the religious unorthodoxy of tomorrow".

Mr. Justice FRANKFURTER wrote a concurring opinion which took the position that determination of obscenity was a question of "applying contemporary community standards", to be determined by judge or jury. Accordingly, the lack of opportunity to introduce the testimony of qualified experts as to the prevailing literary and moral community standards was, in his view, the real vice in the ordinance.

Mr. Justice DOUGLAS wrote a concurring opinion which, while it expressed doubt that the Bill of Rights permitted any censorship, declared that there was "no harm, and perhaps some good" in the rule fashioned by the Court which requires a showing of scienter. "What the Court does today may possibly provide some small degree of safeguard to booksellers by making those who patrol bookstalls proceed less high-handedly than has been their custom", Mr. Justice DOUGLAS concluded.

Mr. Justice HARLAN wrote an opinion concurring in part and dissenting in part. He expressed his unwillingness "on the meagre data before us" to decide whether the absence of scienter rendered the ordinance unconstitutional. The standard to be applied, he argued, was whether the work complained of exceeded the limits of candor set by contemporary community standards, and the conviction here was defective in that the trial judge turned aside *every* attempt to introduce evidence bearing on community standards. The case should be remanded for a new trial, Mr. Justice HARLAN declared.

The case was argued by Stanley Fleishman and Sam Rosenwein for appellant and by Roger Arnebergh for appellee.

Employers' Liability Act . . . *negligence*

Inman v. *Baltimore & Ohio Railroad*, 361 U. S. 138, 4 L. ed. 2d 198, 80 S. Ct. 242, 28 U. S. Law Week 4041. (No. 36, decided December 14, 1959.) *On writ of certiorari to the Supreme Court of the State of Ohio. Affirmed.*

This was an action under the Federal Employers' Liability Act, 35 Stat. 65, 45 U.S.C. §61, for personal injuries sustained by petitioner in the course of his employment. Petitioner, a railroad crossing watchman, was struck and injured by an automobile driven by an intoxicated driver. Petitioner was flagging traffic for a passing train at a busy crossing in Akron, Ohio. The theory of the action was that petitioner's duties, which included flagging traffic, maintenance of a lookout for other trains and the reporting of hot boxes on passing trains, required him to face the train tracks and created the likelihood of his being struck by automobiles at the intersection. A jury awarded a verdict for $25,000 but the Ohio Court of Appeals reversed on the ground that there was a complete failure to prove that the railroad was negligent.

The Supreme Court agreed, affirming in an opinion delivered by Mr. Justice CLARK. The Employers' Liability Act does not make the employer an insurer, the Court pointed out. Here, there was no claim that the intersection was dark or that the regular railroad crossing warning, lights, bells, etc., were not properly working, and the petitioner was waving a lighted lantern in each hand. Likewise, the Court went on, there was no doubt about the intoxication of the driver of the automobile.

Mr. Justice WHITTAKER wrote a concurring opinion which stressed the lack of evidence of any negligence on the part of the railroad. Indeed, he suggested, the only way for the railroad to protect its flagman from such lawless conduct by third persons would be "to provide them with military tanks and make sure they stay in them while within or moving about crossing intersections. . ."

Mr. Justice FRANKFURTER noted that he joined in the Court's opinion in order to make it possible to obtain a majority although he reiterated his often-expressed opposition to the Court's entertaining cases of this nature.

Mr. Justice DOUGLAS, joined by the CHIEF JUSTICE, Mr. Justice BLACK and Mr. Justice BRENNAN, wrote a dissenting opinion which argued that the jury was justified in its finding of negligence on the theory that the number of duties that the flagman was required to perform kept him too busy to protect himself from vehicular traffic.

The case was argued by Raymond J. McGowan for petitioner and by William A. Kelly for respondent.

Editorial

(Continued from page 170)

does not know what else he would rather do, or wants to do, or because he feels himself a potential John Marshall? Is the applicant fired by a zeal to make a success in the law by every proper means? Does the applicant realize that attainment of success means long hours and hard work, and that if he is not willing to make the law his mistress, he had better seek another profession? As a condition of admittance to a law school should not the applicant be given a sort of pre-admittance course so that he will understand clearly before he makes his final decision what it will mean to be a lawyer, his obligations to society and to his profession, that the law is a learned profession and lawyers are bound by a strict code of ethics by which he will have to live all his days? Then he will have an opportunity to forgo the law before he has wasted his own and others' time in a law school.

While we examine the problem of too many and too few, let us examine also the calibre of the entering and final product of our law schools. We may not need more lawyers, only more devoted, industrious and able lawyers.

What's New in the Law

The current product of courts, departments and agencies

George Rossman · EDITOR-IN-CHARGE

Richard B. Allen · ASSISTANT

Admiralty Law . . . *res ipsa loquitur*

The Court of Appeals for the Fifth Circuit has refused to apply the doctrine of *res ipsa loquitur* to the collision of a ship under compulsory pilotage with the banks of the Panama Canal.

The theory of *res ipsa loquitur* approved in this case as it was in a 1954 case, by the United States District Court for the District of Panama, was that the vessel was sufficiently under control of the Panama Canal Company by being under the Company's pilot that an accident raised an inference of negligence against the Company if the conduct of the pilot was not satisfactorily explained.

The Fifth Circuit found a vital link in the *res ipsa loquitur* chain missing. It pointed out that the instrumentality —the ship—was not under the kind of control when under pilotage as is a train or streetcar, the usual vehicles against which the doctrine is employed. Actual control when a ship is moving under its own power with a pilot, the Court remarked, remains in the shipowner, officers and crew. "The amount of actual control exercised by the pilot is limited by the efficiency and cooperation of the ship's personnel", it said. Having disposed of the *res ipsa loquitur* theory, the Court went on to rule that the libellant had not proved a case against the Company.

(*Victorias Milling Company* v. *Panama Canal Company*, United States Court of Appeals, Fifth Circuit, November 30, 1959, Wisdom, J.)

Bar Associations . . . *deductible bequests*

Bequests made by William Nelson Cromwell to three New York bar associations have been held deductible from the Cromwell gross estate for estate tax purposes. This is the decision of the Court of Appeals for the Second Circuit, reversing a ruling of the United States District Court for the Southern District of New York in 155 F. Supp. 275 (44 A.B.A.J. 173; February, 1958).

The question was whether the bar association legatees qualified as corporations "organized and operated exclusively for religious, charitable, scientific, literary or educational purposes . . . and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation . . ." within the meaning of §812(d) of the 1939 Internal Revenue Code. The groups involved were the New York County Lawyers Association, The Association of the Bar of the City of New York, and the New York State Bar Association.

In the lower court the deduction was denied primarily because the district judge thought that the activities of the associations in attempting to influence legislation prevented them from fitting the statutory description. But the Second Circuit pointed out that legislative recommendations made by the bar associations were designed "to improve court procedure or to clarify some technical matter of substantive law [and] are not intended for the economic aggrandizement of a particular group or to promote some larger principle of governmental policy". These factors, the Court declared, led it to conclude that the legislative activity was not such as to cause a forfeiture of charitable status.

The Court continued: "The major portion of this work is of a technical nature . . . [and is] expressed in expert reports on matters uniquely within the fields of experts and has avoided questions which are outside those fields, i.e., questions which turn largely on economic or political decisions. These activities serve no selfish purpose of the legal profession—rather they constitute an expert's effort to improve the law in technical and non-controversial areas."

The Court also dealt with three other activities that had been singled out as taking the associations out of the charitable category. These were regulation of the unauthorized practice of law, discipline of the profession, and efforts to improve court procedure, including endorsement of judicial candidates. Speaking of the unauthorized practice of law function, the Court noted that the associations were helping enforce New York law, and that the cost of regulation would fall on the public if not assumed by the bar associations. As to professional discipline, the Court pointed out that New York had conferred powers on the organized Bar in this field, and it concluded that the "true benefit from a disciplined and socially responsive bar accrues directly to the public".

(*Dulles* v. *Johnson*, United States Court of Appeals, Second Circuit, December 14, 1959, Waterman, J.)

Censorship . . . *vacuum-packed case*

The Court of Appeals for the Seventh Circuit has refused to be drawn into a decision on the constitutional validity of Chicago's motion picture licensing ordinance in the absence of knowing anything about or seeing the picture which the exhibitor desired to show.

The Chicago ordinance, under attack in several cases on the ground that it entails unconstitutional censorship, provides that no picture may be shown without a license granted by the Police Department. In this case the owner of the film did not produce it for a police preview; of course the license was refused. The plaintiff then sought an order commanding the issuance of a license, which the district court denied. The picture was not shown or put in

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

the record in either the district court or the Seventh Circuit.

Noting that the plaintiff had limited its facts "in an obvious attempt to so frame a case that the United States Supreme Court will be persuaded to rule upon the question of constitutionality of motion picture censorship", the Court declared that the case had been reduced to an abstract question of law upon which it would not rule. "With the physical object constituting the subject matter of this complaint hidden from the Court", it remarked, "we are left to guess as to what our holding is to apply."

While the name of the picture, *Don Juan*, and statements in the plaintiff's brief about obscenity gave some clues about the picture involved, the Court said it might depict, as far as it knew, anything from a Sunday School picnic to a school of crime teaching how to assassinate the President of the United States.

(*Times Film Corporation* v. *City of Chicago*, United States Court of Appeals, Seventh Circuit. November 27, 1959, Schnackenberg, J.)

Criminal Law . . . *jury selection*

The Supreme Court of Arkansas has affirmed a murder conviction and death sentence, turning down a contention that the trial judge committed reversible error by permitting the State to challenge peremptorily an accepted but unsworn juror after the defendant had exhausted his challenges.

The defendant grounded his argument on statutes that he claimed gave him the last challenge. He urged that the trial court's action had deprived him of this right. One section of the statute provides that after the judge has determined the juror to be competent "the State may challenge him peremptorily or accept him, then the defendant may peremptorily challenge or accept him". Another section states that "the State must exhaust her challenges to each particular juror before such juror is passed to the defendant for challenge or acceptance".

Remarking that the defendant was not entitled to a particular juror, the Court approved the trial judge's procedure, but with a proviso that the defendant not be prejudiced by the service of the person accepted in lieu of the excused juror. In the instant case, the defendant's attorney had objected to the excusing of the accepted juror when he had no more challenges, but he raised no objection to the substitute juror and did not attempt to show any reason why the new juror would not be fair and impartial. From this the Court concluded that the defendant was not prejudiced by the substitution, even without a challenge.

Answering an argument that its position might permit wholesale alterations of juries after the defense is without challenges, the Court said that the discretion of trial judges would take care of that. And it indicated that permitting the challenge of several jurors already accepted, unless good and sufficient cause were shown, might be an abuse of discretion.

Two judges dissented. They charged that the majority had nullified the statutes relating to jury selection and had disregarded the settled law of Arkansas to follow a 1954 case which they deemed inapposite. They termed unrealistic a suggestion of the majority that the defense counsel might well save a challenge or two to meet contingencies such as the one in this case.

(*Nail* v. *Arkansas*, Supreme Court of Arkansas, November 2, 1959, rehearing denied December 7, 1959, Harris, J., 328 S.W. 2d 836.)

Federal Employers' Act . . . *new scintilla rule?*

The Court of Appeals for the First Circuit may have developed a new "faintest scintilla" rule for Federal Employers' Liability Act cases. At least that is the expression it used in affirming a judgment for a New Haven waitress who claimed a mental breakdown as a result of being on a train which struck and killed a woman who came on the tracks to commit suicide.

Hanging its affirmance on a possible theory that the engineer could have applied the brakes sooner had he known that the woman was a suicide when she first came on the tracks, the Court said that it could "discern from the engineer's testimony only the faintest scintilla of evidence to suggest the inference of any casual connection between the engineer's possibly negligent failure to apply the brakes sooner than he did and running down the suicide". Nevertheless, it continued, "as we read recent decisions of the Supreme Court we feel that the plaintiff has shown enough to take her case to the jury."

The plaintiff was shaken up by the engineer's sudden stop, but no serious physical injury was found. Her main complaint was that the occurrence induced her to suffer from paranoid psychosis, which caused her to believe that she was personally responsible for the death of the suicide, as if she were a murderer, and that she would soon be tried for her crime.

The trial judge frankly said the jury reached a "preposterous conclusion" in returning a verdict for the plaintiff, but he denied the defendant's post-trial motions "solely in response" to what he understood to be the views of a majority of the United States Supreme Court. On this facet of the case, the First Circuit disagreed. It said bravely that trial judges in F.E.L.A. cases still have the duty "to screen the evidence to ascertain whether it is enough to persuade reasonable minds that some negligence of the employer contributed in some way or another to the plaintiff-employee's injury", then quickly admitted that this function had to be performed with an eye to the trend indicated by the Supreme Court's recent F.E.L.A. decisions. It was this trend that led the Court then to affirm the jury's verdict.

(*New York, New Haven and Hartford Railroad Company* v. *Henagan*, United States Court of Appeals, First Circuit, November 27, 1959, Woodbury, J.)

Libel . . . *single publication rule*

The single publication rule has been adopted by the United States District Court for the District of Columbia as a part of the common law of the District. The Court applied the rule to defeat a libel suit filed in 1959 based on a book published in 1954.

The English common law was that every sale or delivery of libellous material was a new publication and that

a new cause of action accrued on each occasion. The Court made an examination of American decisions, however, and came up with the conclusion that the modern American law of libel has adopted the single publication rule through decisional and statutory law. "[I]t is the prevailing American doctrine", the Court stated, "that the publication of a book, periodical or newspaper containing defamatory matter gives rise to but one cause of action for libel, which accrues at the time of the original publication, and that the statute of limitations runs from that date." The Court noted that several states have adopted the rule by statute, using the Uniform Commissioners' Single Publication Act.

The Court found support for deviating from the English rule in the proliferated dissemination now given printed materials. It would be inconceivable and intolerable, the Court remarked, to permit a separate suit to be brought in regard to a sale or delivery of every copy of a modern publication.

(*Ogden* v. *Association of the United States Army*, United States District Court, District of Columbia District, October 14, 1959, Holtzoff, J., 177 F. Supp. 498.)

Public Schools . . .
Bible reading

A Pennsylvania statute requiring the reading of ten verses from the "Holy Bible" in public schools at the opening of each school day has been declared void as repugnant to the provisions of the First Amendment of the Federal Constitution. The decision came from a three-judge panel of the United States District Court for the Eastern District of Pennsylvania, with Chief Judge Biggs of the Third Circuit writing the opinion.

In addition to asking a finding of unconstitutionality and an injunction against the statutorily mandated Bible reading, the complaint was also directed against group recitation of the Lord's Prayer, which, while not provided for in the statute, had grown up as a customary exercise after the Bible reading. This was followed in turn by recitation of the pledge of allegiance to the flag. The plaintiffs alleged, however, the Bible reading was unconstitutional with or without the addition of recitation of the Lord's Prayer.

While the Court agreed with contentions that the Bible is a book of great moral, historical and literary value, it ruled that its essential character is a religious document. Since it is a religious book, the Court continued, required reading from it in public schools violates the establishment-of-religion provisions of the First Amendment. The Court declared:

> . . . The daily reading of the Bible buttressed with the authority of the State and, more importantly to children, backed with the authority of their teachers, can hardly do less than inculcate or promote the inculcation of various religious doctrines in childish minds. Thus, the practice required by the statute amounts to religious instruction, or a promotion of religious education. It makes no difference that the religious "truths" inculcated may vary from one child to another. It also makes no difference that a sense of religion may not be instilled. . . In our view, inasmuch as the Bible deals with man's relationship to God and the Pennsylvania statute may require a daily reminder of that relationship, that statute aids all religions. Inasmuch as the "Holy Bible" is a Christian document, the practice aids and prefers the Christian religion.

The Court conceded there might be no objection to the statute if the study of the Bible were placed on an artistic, moral or historical basis, separated from the espousal of doctrine and religion. But, the Court said, enforced reading by legislative fiat did not effect the necessary separation.

The Court also turned down the contention that because the statute specified that the reading be "without comment", the listener had freedom to interpret what he heard as he desired and that accordingly there was no inculcation of religion. It said that argument either ignored the essentially religious nature of the Bible or assumed that its religious quality could be disregarded by the listener. "This is too much to ignore and too much to assume", it declared.

Additionally, the Court concluded that the statute violated the freedom-of-religion aspects of the First Amendment. This was affected, the Court said, through the subtle compulsion of conformity in the daily "devotional exercises". The Court also ruled that the combined Bible reading and mass recitation of the Lord's Prayer violated the First Amendment.

(*Schempp* v. *School District of Abington Township*, United States District Court, Eastern District of Pennsylvania, September 16, 1959, Biggs, J., 177 F. Supp. 398.)

Trial Practice . . .
unwelcome spectator

A Missouri trainman has lost a $45,000 verdict for the loss of one eye because a blind man sat behind him during a part of the trial.

The unusual facts arose this way: a brakeman-baggageman sued his railroad-employer in a Federal Employers' Liability Act suit for the loss of an eye he said was caused by dirt and dust getting into his eyes during performance of his duties of looking outside the long trains. He alleged the railroad was negligent in not furnishing him free goggles.

During the trial a blind man, carrying a white cane and cigar box, entered the courtroom and sat on a bench immediately behind the plaintiff and his family. He remained there during a part of the defendant's case and for the plaintiff's rebuttal, but he did not return for the jury arguments later in the day. How and why did he get there? The defendant's attorney said the blind man's appearance was "pre-arranged" by the plaintiff's attorney. The trial judge, in denying the defendant's motion for a mistrial, concluded that the episode was not wilfully contrived and that the blind man's presence did not influence the jury.

The plaintiff's attorney's explanation was that the blind man, one Fred Minstermann, was an old client who had studied some law and who liked to hear lawyers' trial arguments. It just happened that Fred called him that morning because Fred wanted to see him, and when told that he was trying a case in a certain court, Fred said he would come up and try to see him there. That's all there was to it, the plaintiff's attorney explained, and it was "nonsense" to suppose that the

presence of a blind person could have anything to do with a case for the loss of an eye.

The Supreme Court of Missouri disagreed. It declared that no imagination was required to think of several ways in which Fred's presence might have influenced the jury and its decision. The Court noted, for instance, that the plaintiff's attorney had emphasized the serious position the plaintiff would be in if he lost the other eye, the fact that he had been discharged by the railroad, and his efforts to find employment. "In these circumstances", the Court remarked, "the presence of Mr. Minstermann might reasonably suggest to the members of the jury that plaintiff, too, might be reduced to the unfortunate situation of having to earn his living by selling notions from a cigar box on the public streets."

Although the incident was not contrived, the Court said it could not give its tacit approval to it. "The relationship between Mr. Minstermann and plaintiff's counsel appeared to be such that a suggestion from counsel would probably have kept the blind man out of the courtroom", the Court stated. It pointed out that courts have inherent power to regulate admission of the public so as not to interfere with the administration of justice, and that it was not a complete answer for the plaintiff's attorney to say "as he did in argument on the motion to discharge the jury that 'this is an open and public courtroom' "

Opposing the mistrial, the plaintiff had procured and filed the affidavits of eleven jurors. Those who noticed Fred and knew he was blind said in effect his presence had nothing to do with the verdict. To this, the Court answered: "The arousing of sympathy or prejudice is often so subtle that the person affected is the last to become aware of it or admit its existence. Otherwise, the reaction of the average person would be resentment."

(*Fitzpatrick* v. *St. Louis-San Francisco Railway Company*, Supreme Court of Missouri, September 14, 1959, rehearing or transfer to Court en banc denied October 12, 1959, Storchman, J., 327 S.W. 2d 801.)

Notice by the Board of Elections

The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1960 Annual Meeting and ending at the adjournment of the 1963 Annual Meeting:

Arizona	Nebraska
Connecticut	New Jersey
District of Columbia	Oklahoma
Illinois	Puerto Rico
Iowa	South Carolina
Maine	South Dakota
Michigan	Texas
Mississippi	Washington
Montana	Wyoming

A State Delegate will be elected in Massachusetts to fill the vacancy for the term ending at the adjournment of the 1962 Annual Meeting.

A State Delegate will be elected in Rhode Island to fill the vacancy for the term ending at the adjournment of the 1961 Annual Meeting.

Nominating petitions for all State Delegates to be elected in 1960 must be filed with the Board of Elections not later than April 1, 1960. Petitions received too late for publication in the April issue of the JOURNAL (deadline for receipt March 1) cannot be published prior to distribution of ballots, which will take place on or about April 11, 1960.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1155 East 60th Street, Chicago 37, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M., April 1, 1960.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Any member of the Association in good standing in a state where the election is being held is eligible to be a candidate. There is no limit to the number of candidates who may be nominated in any state and nominations are made only on the initiative of the members themselves. While more than the required minimum of twenty-five names of members in good standing may appear on a nominating petition, special notice is hereby given that no more than twenty-five names of signers of any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS
Walter V. Schaefer, Chairman
Harold L. Reeve
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Department of Legislation

Charles B. Nutting, Editor-in-Charge

The Index Digest of State Constitutions: A Review

When Mark Twain was making the stage coach journey to the West, which was later recounted in *Roughing It*, he was accompanied by Webster's *Unabridged Dictionary*. According to his account, he spent long hours while crossing the plains reading this volume and wondering how the characters were going to come out. The work which is now described in these pages[1] has a similar fascination, but a review of it, like that of a dictionary, presents difficulties which do not arise in ordinary cases. One cannot comment on its literary style or on its plot because it does not purport to have either. It presents no thesis to attack or defend. No dastardly villain lurks within its pages. And yet it is a work of extraordinary merit which deserves the fullest recognition.

Perhaps one way to begin the discussion would be to point out that the first edition of the publication appeared in 1915 and that no other volume contains similar material. Thus, for over forty-five years there has been no means of determining without exhaustive and time-consuming research what provisions were to be found in the various state constitutions which were adopted since the original publication. When one considers that the period from 1915 to the present was marked by great expansion of governmental activity, it becomes apparent that a new edition was sorely needed. But the task of preparing such a work was, of course, enormous. Fortunately, the Legislative Drafting Research Fund of Columbia University, which had prepared the original edition, was able to find the time, the persons and the resources to do the job.

As is true of any reference work, some techniques are necessary in the use of the *Index Digest*, and they involve something more than knowledge of the alphabet. However, the Editor's preface contains a clear explanation of the way in which the volume should be used. This information will not be repeated here but it may be noted that limited experimentation on the part of this reviewer indicated that very little difficulty will be encountered.

A somewhat random sampling of the contents produced some intriguing results. For example, while only one state (Louisiana) has accorded garbage districts the distinction of constitutional recognition, drainage districts have been so honored by no less than eight. On the more serious side, the volume is extremely useful in determining how the states have dealt with matters of significance and in discovering the problems which, from time to time, have been considered of fundamental importance and hence worthy of inclusion in the basic law.

One surprising aspect of the sampling, as far as a person without intimate knowledge of state constitutions is concerned, was the extent to which governmental theory is expounded and fundamental rights are declared. States have apparently found it desirable to spell these matters out to a much greater extent than did the framers of the Federal Constitution. Some of the fundamental principles enunciated include adherence to frugality, industry, justice, moderation, piety, temperance and virtue. It would be an interesting historical study to trace the origin of these statements and to determine the environment which produced them, not to mention the extent to which they are presently ignored.

A similar study might be undertaken through the use of the *Index Digest* of the matter of legislative divorce. Probably because of the fact that divorces were obtainable only through Parliament in England, legislative divorces were not uncommon in the American colonies and in at least some of the states. However, many of the states now prohibit such divorces, usually providing that they may not be granted by any private, local or special law. Whether these provisions preceded or followed the British Matrimonial Causes Act might easily be discovered although reference to the state constitutions themselves would be necessary. It would, of course, be practically impossible to include the date of each constitutional provision in the *Digest*. The task of the researcher is made infinitely easier, however, since at least he knows which state constitutions contain the relevant provisions.

A more practical matter which this reviewer found of interest is the extent to which state constitutions deal with exemption from taxation. By finding the general heading "Taxation" and then the subheading "Exemptions" these provisions were readily discovered. Apart from the common exemptions of educational, charitable and religious institutions, certain specific exemptions throw an interesting light on the problems of certain states and areas. In a few predominantly rural states agricultural implements and property are either constitutionally exempt or may be made so by the legislature. In at least two arid states property used in irrigation is exempt under certain conditions. For a period of time Florida, apparently hoping to compete with California, exempted motion picture studios from *ad valorem* taxation. All in all, the extent and variety of exemptions from taxation are surprising.

One more point, or, rather, question, may be raised. It is understandable that Alabama, Kentucky, South Carolina, Tennessee and Arkansas should have constitutional provisions against dueling, but why Wisconsin?

Enough has been said to indicate that this compilation has at least three significant uses. The first and most obvious is to discover the existing constitutional provisions in the respective states on any given topic. The work is

1. *Index Digest of State Constitutions*, 2d Ed. Richard A. Edwards, editor. New York: Legislative Drafting Research Fund of Columbia University. 1959. $20.00. Pages xv, 1132.

admirably suited to this purpose. The second, primarily historical in nature, is to detect trends or "styles" in constitution making. An example would be the constitutional provision that every bill may have but one subject, expressed in its title. Here, as has been said, the *Index Digest* is a useful first step. Finally, now that many states are concerned with constitutional revision, it can be used for the purpose of discovering examples, both good and bad, of the treatment of problems in other places.

The Legislative Drafting Research Fund has thus performed an important public service in making this volume available. It is obvious that the work has been painstakingly and competently done. The director, the editor, and the staff are to be congratulated on an undertaking which (I am sure to their infinite relief) is finished—at least until it is time to do it again.

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe, Washington, D. C., Editor-in-Charge

AIRPLANES: My friend, Harry N. Rosenfield, of Washington, D. C., is to blame for this. Long ago (April, 1949) Harry wrote a piece in the *New York University Law Quarterly Review* (Vol. 24, No. 2, pages 319-335; $2.00 a copy; Vanderbilt Hall, Washington Square South, New York 3, N. Y.) entitled "Administrative Determinations as State Law Under Erie v. Tompkins". As all his stuff, it is a provocative article and it set me thinking about airplane accidents.

Out in Iowa City, Iowa, at the *Iowa Law Review*, there is a lad that for want of his name I shall call George Spelvin, who has also been doing some thinking about this choice of law problem in airplane accident cases. Until I read Spelvin's study (*Iowa Law Review*, Iowa City, Ia., $1.75 per copy; Fall issue, 1959, Vol. 45, No. 1), I confess I thought that the Federal Tort Claims Act had been so drawn as to codify the reactionary rule of *Erie* v. *Tompkins*.

You remember that when the Bolivian plane at Washington's National Airport crashed into Eastern's D. C. 4, as against Eastern the question as to where the crash occurred was left to the jury. It selected the District of Columbia, where liability is unlimited, rather than Virginia, where $15,000 is the maximum recovery (*Union Trust Company* v. *Eastern Air Lines*, 221 F. 2d 62, reversed in part, 350 U. S. 907, and *Union Trust Co.* v. *United States*, certiorari denied, 350 U. S. 911).

However, the control tower of F.A.A. and the Washington Airport are in Virginia, and by a two-to-one vote, the Court of Appeals for the District of Columbia Circuit held as against the United States under the Federal Torts Claims Act liability was limited to $15,000. It was not only the fact that the tower was in Virginia but rather that the Act imposes liability:

> Where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The majority of the District of Columbia Court of Appeals decided that under this section the negligence of the control operator of F.A.A. was in Virginia rather than in the District of Columbia where the jury found the planes had crashed. Judge Wilber Miller dissented from this view, arguing that under the Tort Claims Act, the United States is liable "in accordance with the law of the place where the tort occurred".

A third view (*Hess* v. *United States*, 259 F. 2d 285, and *Landon* v. *United States*, 197 F. 2d 128) would interpret the magic words to mean that under the act you apply not only the law of the place where the U.S.A. was negligent but also the conflict of laws rules of that place. The *Hess* decision of the Ninth Circuit has been appealed to the Supreme Court of the United States. It is Docket No. 5 on the October, 1959, Calendar and was decided on January 16.

Mr. Spelvin thinks as I do that in actions against the Government under the Federal Tort Claims Act, there should be one substantive rule that should not vary from state to state. He urges that the Supreme Court of the United States select one of these three rules of interpretation of the language in the Federal Tort Claims Act, or better yet that the Congress repeal the provision to make the Government liable "in accordance with appropriate law". Another convert to *Swift* v. *Tyson*.

From Spelvin's piece, I turned to the *Bar Bulletin* published by the New York County Lawyers Association, 14 Vesey St., New York 7, N. Y., at its beautiful building opposite St. Paul's Chapel that William Nelson Cromwell donated. It was many years ago that my then Chief, William Dean Embree, proposed me for membership in this bar association and I love to read its monthly bulletin.

In the September-October, 1959, *Bar Bulletin* (Vol. 17, No. 2 at pages 58-64), I found the finest airplane accident article I have ever read. It is written by Lee S. Kreindler and he has done a whale of a job. As Edmund H. H. Cady, the *Bulletin*'s distinguished editor, comments (page 50), like Captain Jack Boyle in Sean O'Casey's *Juno and the Paycock*, Kreindler demonstrates that "the wur-r-r-ld" of air law is in a terrible "state of chassis".

Long ago, I discovered how treacherous the pitfalls could be. Some tickets

require you or your estate to claim within thirty days. Then you have to be careful where your plane falls. I once marked on a map of the United States these state maximum damage statutes. At that time, I decided the worst place to fall was in Colorado, where the limit was then $5,000. But until I read Mr. Kreindler's piece, I never knew how little I really knew of the pitfalls.

First, even if you are lucky enough to crash in the United States, if you have made the mistake of buying a ticket to an international destination that adheres to the Warsaw Convention your maximum claim is 125,000 Poincaré French francs or $8,300 unless you can show "wilful misconduct". Ever since my friend, William J. Junkerman, prevented Ellen Ross, known professionally as Jane Froman, from recovering more than $8,300 for the crash of a Pan Am plane in Lisbon harbor (*Froman* v. *Pan-Am*, 284 A.D. 935, Case 4, 299 N. Y. 88, certiorari denied, 349 U. S. 947, Case 4, Docket 735 at the October, 1954, Term), recoveries for "wilful misconduct" have been difficult. Mr. Kreindler states the definition given at the trial of Jane Froman's case by Mr. Justice Aaron Steuer defines the phrase "as misconduct despite knowledge of consequences" (page 61). Only one recovery for "wilful misconduct" has been had (*American Airlines* v. *Ulen*, 186 F. 2d 529, in the District of Columbia Circuit in 1949). There have been settlements and a number of jury verdicts that have been reversed.

Recently a District of Columbia jury gave over $300,000 for "wilful misconduct" in the crash of the KLM Super Constellation in the high seas off the coast of Ireland. Mr. Kreindler discusses this crash and points out that when a plane crashes on the high seas, the action is governed not by the Warsaw Convention but by the Death on the High Seas Act (*D'aleman* v. *Pan-Am*, 251 F. 2d 493, Second Circuit). Such an action lies in admiralty and you can't have a jury. Moreover, Section 4 of the Act refers you to foreign law, but the Southern District of New York in the crash of that Venezuelan plane on the Atlantic held that, despite Section 4, a passenger has an action under Section 1 of the act which applies to American flag carriers (*Fernandez* v. *Linea Aeropostal Venezolana*, 156 F. Supp. 94, a decision of Judge Archie Owen Dawson that Judge William F. Smith has followed in New Jersey, *Noel* v. *Airponents*, 169 F. Supp. 348).

I gather if Section 4 of the Death on the High Seas Act applies in the KLM crash, a beneficiary has to show under Dutch law that his standard of living has been impaired. No funeral expenses are allowed and benefits under life insurance policies are credited against the damages. In other words, you may owe KLM money.

Even under the Warsaw Convention, accidents that occur in Italy are limited in recovery for wrongful death to $256 instead of $8,300. On July 24, 1959, President Eisenhower submitted the Hague Protocol to the Senate for ratification. It contains amendments to the Warsaw Convention under which the limitation will be raised to 250,000 Poincaré French francs or $16,600 but the Protocol "defines 'wilful misconduct' to specifically apply standards that sound very much like the language of Judge Steuer in the *Froman* case" (page 62).

Of course, you can sue the pilot and other airline employees who are sometimes insured under the line's policy and your chances of recovery against them are better. If the crash is caused by a bad altimeter or faulty construction, you can, of course, also sue the plane manufacturer.

If you are so fortunate as to be retained by the family of a plane victim, my advice is that before you sue anyone you write for a copy of the *Bar Bulletin*, for which no price is stated.

This is a splendid presentation of very difficult and as yet undecided points of law. I note, however, that a petition for certiorari in a Death on the High Seas Act case was denied by the Supreme Court on November 9, 1959 (Docket Nos. 378 and 437 at the October, 1959, Term, a National Airlines crash). That case was decided below by the Fifth Circuit in an opinion written by Judge Elbert Tuttle from which Judge Ben F. Cameron dissented. Liability was conceded and the only questions appealed related to the measure of damages. The Court sustained a judgment for $250,000 with interest from the date of death for the widow of Harry Stiles, a New Orleans lawyer, age 51, and earning an average of $41,800 per year. The case is reported as *Stiles* v. *National Airlines* in 161 F. Supp. 125 and 268 F. 2d 400, certiorari denied 28 United States Law Week 3145. A petition for rehearing was denied on December 8, 1959.

LADY LAWYERS: In the November 12, 1959, issue of the *Harvard Law Record* (Vol. 29, No. 7, November 12, 1959; $2.00 a term, $4.00 a year and 20¢ a copy; 23 Everett St., Cambridge 38, Mass.) an aging graduate, Arthur Stambler, '48, writes this poem:

ON READING OF A
TOUCH FOOTBALL GAME
BETWEEN MALE AND FEMALE
HARVARD LAW STUDENTS

I

Hold That Threnody

Wail away Warren; Roll over Ames!
Today plumbs the depths of all shames
That could ever foul an honorable
escutcheon.

Dear H.L.S., is there no limit to how
much on
Your once-proud head can now be
poured?
To hear the mating shrieks of mice
where once strong maledom
roared . . .
You invited sick Pandora when you
opened doors to dames.

Rise up Langdell . . . to sound your
knell
Amid the perfumed halls
(Once cloistered walls where adults
tackled law)
Now youngsters touch each other,
and the sound of giggles falls,
As they burn with soft . . . and
scarcely gem-like . . . flames.

What now, Griswold? . . . Fuller, speak!
Shall honors soon be going to the one
most chic with a quarterback
sneak?
(I see future alumnae (in a most
horrid dream) boast not of making
law review, but the girls' touch
football team).
And what fame, sirs, in offering the
nation's
Largest course in domestic relations,
And all such boy-girl games?
Who ever thought we'd live to see
(And may not live to care)
Co-educated punt and pass
Replace the student's prayer;
That comely limbs bermuda'd

Kicking high their "sis-boom-baw"
Should become the symbol and the cry
At once-honored Harvard Law.

II

A Cheer for the Winning Boys' Team to the Losing Girls' Team

Contracts, Sales, Taxation, Torts . . .
All you girls are darn good sports!

Law Reviews and Lincoln's Inns . . .
It's such good fun! who cares who wins!

Langdell, Pound, Bull Warren, Ames . . .
Let us share in all your games.

Touchdown, end-run, punt and pass . . .
Now we'll race you girls to class.

It would seem to me that if the *Harvard Law Forum* can devote an evening to hearing the "Beatnik" Poets, it could devote one to its many alumni who wrote poems there. I'd make the pilgrimage myself just to hear my friend Hiland Hall, Esq., of the New York Bar, read his poems about "T.R.P.", not to mention the ones about his classmates.

Apparently, the *Record* had the same thought because they bill Mr. Stambler's poem in "*Lights*", as they should. Although his masterpiece appears on the last two pages of the November 12, 1959, issue, the cover in large type calls attention to it, this way:

"ALUMNIK POETRY"

"Hi" Hall and "Art" Stambler better pack their bags. Thanks to the "Beatniks" of last year, "Alumnik" poets are this year in demand at Harvard Law School.

COMMON MARKET: Before my friend Tom Matthews writes another letter of protest to the Editor, I hasten to confess that Joseph W. White, the Editor of the *Virginia Law Weekly* has been sending me regularly his school's excellent newspaper. I have been regularly reading and enjoying it. I note the *Virginia Law Forum* will hear two live Senators this year, Hart of Michigan and Clark of Pennsylvania, as well as Walter P. Reuther, Mayor Robert Wagner and Marquis W. Childs. The aviation law class of Erwin Seago is also to hear, as mine did last year, the able and attractive General Counsel of the new Federal Aviation Agency, Daggett H. Howard. Things are cooking at Charlottesville.

The most distinctive feature of the *Virginia Law Weekly* ($4.00 a year or 20c a copy, Charlottesville, Virginia) is not the picture of Mr. Jefferson (Not "President" and not "Jefferson". Because "in Charlottesville, Sir, we say 'Mr.' Jefferson of 'The University' ", as Dean "Billie" White of Virginia Law School once told me while walking across the beautiful "Lawn" to the Faculty Club). The *Virginia Law Weekly's* most distinctive contribution every year is its "Dicta" column.

In case you do not know about it, some very fine things have been written in it. Each year the newspaper selects a different topic. Week by week through the year a distinguished authority in the field selected writes a column for the paper. This year the topic selected is "Law and Foreign Investment", and while in the past other subjects such as government contracts have interested me as much, none has ever interested me more than the current series because of the rise in importance of the European common market.

Every Washington lawyer fancies himself a bit of an authority on international law and to the man each agrees the No. 1 problem in that field is the fate of the common market in Europe. If it succeeds, then common markets elsewhere are assured—North America—Central America—South America—Africa, to mention but a few. This is why the topic selected by the *Virginia Law Weekly* this year for its "Dicta" column is so timely. If you do not care to read the pieces week by week through the year for a small price the *Law Weekly* will send you the bound volume of this and other years.

At the Hotel Statler on February 11, 12 and 13, 1960, there will be a conference on the "Legal Aspects of the European Community". It is under the able direction of a former colleague of mine at Messrs. Milbank, Tweed, Hope and Hadley, namely, Henry T. King, Jr., the very able Deputy General Counsel of the International Cooperation Administration. To the Conference he is bringing two distinguished Europeans: M. Jean Rey, Commissioner of E.E.C., member of its Executive Committee, head of the Special Committee to study the effects of the common market on other countries and formerly Belgium's Minister of Economic Affairs; and, M. Michel Gaudet, Legal Director of three communities, namely, the European Common Market, Euratom and Coal and Steel. In addition, many outstanding American lawyers and law professors will participate.

The topics selected for discussion cover a wide range: Taxes, Trademarks and Patents, Financing, Business Organizations, Legal Systems and Antitrust. The discussion on the last subject makes the meeting a must for me as my scouts tell me that E.E.C. has found good in the Sherman and Clayton Acts. This will distress my friend Joseph Burns, of the New York Bar, but will cause Dean Rostow of Yale to dance in the streets. I may do a jig with him too.

The full conference costs $40 but poor law professors and members of the Federal Bar Association may come for $15. You write F.B.A. at 1737 H Street, N.W., Washington 6, D. C., for reservations. While locally the arrangements are under the direction of F.B.A., the Conference is also sponsored by our American Bar Association's Section of International and Comparative Law, the American Society of International Law, the International Law Committee of The Association of the Bar of the City of New York and many other prominent bar associations. To the international lawyer and the international law professor the conference is a "must" and just about every lawyer who is anybody in international law will be there.

Henry King deserves a Medal of Merit from the lawyers of E.E.C., Euratom, the Coal and Steel Community and just common markets everywhere for arranging what looks to be an outstanding conference that will give very much needed briefing to the American Bar on problems we face in dealing with these significant new entities.

Tax Notes

Prepared by Committee on Bulletin and Tax Notes, Section of Taxation, Kenneth H. Liles, Chairman; John M. Skilling, Jr., Vice Chairman.

Federal Tax Transferee Liability

The dispute which existed for many years as to whether state or federal law controlled as to the liability of a transferee for federal income taxes has been resolved, in part, at least, by two 1958 Supreme Court decisions. In *Commissioner* v. *Stern*, 357 U. S. 39, and *United States* v. *Bess*, 357 U. S. 51, the Court passed on cases involving beneficiaries of life insurance policies. The purpose of this note is to explore the probable impact of these decisions on some of the questions involving other types of transferees.

Background

Section 6901 of the 1954 Internal Revenue Code and Section 311 of the 1939 Internal Revenue Code provide that the liability, at law or in equity, of a transferee of the property of a taxpayer for the unpaid taxes (including interest and penalties) of the taxpayer may be enforced in the same manner as against the taxpayer if action is begun in a timely fashion.[1] Generally under these sections, the Service may proceed by way of a notice of deficiency or by way of distraint or suit for collection of an assessed but unpaid tax.[2] For this purpose, the period of limitations prescribed by the Code is extended by one year beyond the equivalent period allowed with respect to the taxpayer.[3] A "transferee" is defined as an heir, legatee, devisee, and distributee.[4]

In the *Stern* and *Bess* cases the exemption of life insurance proceeds in the hands of beneficiaries was at issue.[5] In discussing the problem, the majority in *Stern* found that Congress had not defined the liability of a transferee for income taxes in terms of a federal statute[6] but had intended to apply the substantive body of law existing at the time that it enacted the predecessor provision in 1926. The majority opinion noted that the Committee reports involved indicated that law to have consisted largely of the trust fund doctrine and various state statutory provisions. The fact that *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64 (1938), now requires the federal courts sitting in diversity cases to apply state law in all actions involving state-created rights, including creditors' actions, seemed to the majority to militate against a special category for actions brought by the Government as a creditor for unpaid taxes of another in the absence of a clear mandate from Congress. The majority concluded that the existence and extent of liability should be determined by state law and that a state statute exempting life insurance proceeds was as effective against the Government as against any other creditor. "The Government's substantive rights in this case are precisely those which other creditors would have under [state] law."[7]

Recent Cases

The Tax Court has since applied this rule to exempt the accumulated deductions and interest received from the New York City Employees' Retirement System by the widow of a deceased employee as his duly designated beneficiary. *Laura Lewis*, 33 T. C. . . . (No. 25). The husband had died about a month before his 1951 return was due and his widow elected not to file a joint return. Since the husband's estate was unable to pay any part of the tax due on his separate return the Commissioner turned to these proceeds and contended in the Tax Court that New York City law did not exempt them in the widow's hands.

The Court stated the principal question to be answered was whether under the pertinent municipal law the widow was liable to her husband's creditors generally, including the Commissioner. It then held that a New York City ordinance specifically exempted from creditors these proceeds and all rights *any* person had in them.

A somewhat similar result was recently reached in the District Court for the Middle District of Georgia in *Birdsong* v. *Davis*, . . . F. Supp. . . ., 4 A.F.T.R. 2d 5048. In that case, the widow had previously agreed in settlement of a Tax Court proceeding that she was liable in a stated amount as her husband's transferee with respect to his last two returns. The District Director, after exhausting her other assets, sought to realize on the unsatisfied balance by levying on the house and lot set apart for her by the local probate court as her year's support award. The widow sought an injunction against the sale of her interest in the house and lot. The district court based its opinion in the widow's favor on this point principally on the ground that the Georgia statutes accord the year's support the status of first *claim*

1. Section 311 of the 1939 Code is limited to income taxes. Sections 900 and 1025 are comparable provisions relating to estate and gift taxes. All three provisions are incorporated in §6901 of the 1954 Code which also contains a special provision, §6901(a)(2), with respect to all other taxes of a dissolved partnership or corporation and as to a reorganization coming within §368(a).

2. These sections are not exclusive. The Service may also bring a creditor's bill or an action to set aside a fraudulent conveyance or impose a lien on the transferred assets (*Phillips* v. *Commissioner*, 283 U. S. 589 (1931)); and it may also in certain instances bring an action to enforce an agreement made by the transferee to pay the obligations of the taxpayer (*United States* v. *Scott*, cited in main body of article).

3. Section 6901(c); §311(b). A special provision applies with respect to the subsequent transferee of the initial transferee. Section 6901(c)(2); §311(b)(2).

4. Section 311(f) of the 1939 Code. In §6901(h) of the 1954 Code the definition also includes a donee and a reference to §6324(a)(2) which defines one who takes in distribution of an estate as liable for a proportionate part of any unpaid estate tax.

5. The principal issue involved in *Bess*, the effect of a valid lien subsisting at the date of death of the insured, will not be discussed in this note.

6. As, for example, Congress has done in the case of the estate tax. See Section 827(b), 1939 Code and Section 6324(a)(2), 1954 Code and *Estate of Louise A. Schneller*, T. C. Memo 1959-152. For this reason, the problems discussed in this note do not normally arise in estate tax cases.

7. 357 U. S. at page 47.

against the estate (federal taxes being fourth in line) and alternatively on the ground that even if the Georgia statutes should be construed as *exempting* the year's support, they were still a part of the state law, the whole of which spelled out her liability as transferee.

Another rather interesting examination of local law was required in *Morse* v. *United States*, 265 F. 2d 788 (9th Cir. 1959). In that case assets of a dissolved corporation were transferred to a partnership as part of the husband's plan to give his business the appearance of partial ownership by his wife and others. The United States contended that the wife had ratified the partnership agreement and was therefore liable for the unpaid taxes of the corporation to the extent of her interest in the partnership. The Ninth Circuit held that the law of Illinois required that any party alleging the ratification of an authorized act of an agent (the husband) must show that the principal (the wife) intended to ratify and at the time of ratification had full knowledge of all of the material facts connected with the transaction. The Court then held that on the peculiar facts there involved the wife had not so ratified. This case illustrates the difficulties the Government may have in establishing transferee liability in situations where the facts are complex and the local law requires it to prove certain essential elements not heretofore considered relevant.

Some Other Problems

The result of the *Stern* and *Bess* decisions has been to require the courts to look to state law to determine the existence and extent of transferee liability for the unpaid income taxes of a taxpayer in every subsequent case. Thus, the Tax Court has examined the law of fraudulent conveyances of Tennessee and New Jersey and the exemption of life insurance proceeds in a number of states.[8] It has not yet decided any cases since *Stern* and *Bess* which involve the various other defenses which would constitute an adequate defense to an action by a *private* creditor. Principal among these are the limitations provisions and, in appropriate circumstances, the numerous equitable defenses such as laches, estoppel, election and setoff.

One area in which such litigation may develop is that of stockholder-transferees of a dissolved corporation. Most states provide a statutory obligation on the part of such stockholder-transferees although in others the only remedy for an unpaid creditor of the corporation is an action under the trust fund theory.[9] Almost all provide an abbreviated limitations period in keeping with the desire to put all such liabilities at rest within a reasonably short period. In most cases this period is two years.[10] It is clear under the applicable state decisions that this defense is available to the stockholders of a dissolved corporation against all creditors of the corporation, at least in the absence of fraud or some other compelling factor, in any action brought in the state courts or in a federal district court in a diversity action.

In an action brought to enforce an agreement to be liable for the taxpayer's debts where all of the taxpayer's assets were transferred to the purported transferee, the United States was allowed the greater limitations period applicable under Missouri law to an action on a writing for the payment of money in *United States* v. *Scott*, 167 F. 2d 301 (8th Cir. 1948).[11] In that case, Section 311 was not involved and the United States was therefore not limited by its shorter limitations period. But if an action is brought under Section 311 or 6901, should the limitations period provided therein control if longer than that provided by applicable state law? The answer probably turns on what is meant by the "existence and extent" of transferee liability as that language was employed by the Supreme Court in *Stern* and *Bess*.

In *Stern*, the majority held that "... since §311 is purely a procedural statute we must look to other sources for definition of the substantive liability. Since no federal statute defines such liability, we are left with a choice between federal decisional law and state law for its definition ... Accordingly, we hold that, until Congress speaks to the contrary, the existence and extent of liability should be determined by state law." The legislative history and the language first quoted above from *Stern* indicate that Congress intended that the Government would stand on the same footing as any other creditor and that this should be so whether the Government chose to proceed in the summary manner provided for in Sections 311 and 6901, or whether it chose to pursue its other remedies in the courts. On this basis resort to the applicable state limitations and other defenses would seem proper.[12]

Conclusion

It has been said that the *Stern* case may require legislation.[13] However, there are certain factors which counterbalance any adverse effect on the revenue. One of these is the fact that most husbands and wives file joint returns under the split-income provisions. In this situation the Government will probably still be able to collect from the surviving spouse to the extent of her assets, including the *full* proceeds of insurance received by her, because of the joint and several liability with respect to such returns. However, in such instances the Government will not have the additional period of limitations

8. *Robert Leslie Bowlin*, 31 T. C. 188 (1958), on appeal to 6th Cir.; *Julia Casella*, T. C. Memo 1959-84; *Helen E. Myers*, 30 T. C. 714 (1958); *Vernon M. Bingham*, 30 T. C. 900 (1958); *Estate of Harry Schneider*, 30 T. C. 929 (1958).

9. See, *e.g.*, New York Stock Corporation Law, §105.10, as an example of an express liability. Some states limit the liability imposed by statute to unpaid stock subscriptions. See, *e.g.*, Illinois Revised Statutes (1957) Chapter 32, §157.23. The Ohio Corporation Code, §1701.95 (F) provides: "Nothing herein contained shall preclude any creditor whose claim is unpaid from exercising such rights as he otherwise would have by law to enforce his claim against assets of the corporation paid or distributed to stockholders."

10. See, *e.g.*, Illinois Revised Statutes (1957) Chapter 32, §157.94 and Ohio Corporation Code, §1701.95(E).

11. The Eighth Circuit found specifically that Missouri recognizes the right of a creditor to sue upon the contract of a third party with a debtor to pay the latter's debts.

12. While the Supreme Court itself appears to have reached a contrary result in an earlier case (*Phillips* v. *Commissioner*, *supra*, note 2), it nevertheless refused to pass upon the applicability of state law in that case and specifically so noted in *Stern*, 357 U. S. at page 42. To the extent that *Phillips* is in point, its validity as a precedent is seriously in doubt by virtue of the Court's 1958 decisions.

13. See, among others, the following notes and articles: 15 TEX. L. REV. 137 (1958); 27 GEO. WASH. L. REV. 142 (1958); 37 ORE. L. REV. 361 (1958); 47 KY. L. REV. 556 (1959); 20 OHIO ST. L. J. 361 (1959); 57 MICH. L. REV. 285 (1958); 44 CORNELL L. Q. 278 (1958); and 107 U. PA. L. REV. 290 (1958).

available to it as it would if she were liable as a transferee.[14]

Questions concerning various phases of transferee liability have been litigated in scores of cases. The rule of the *Stern* case will not tend to eliminate much of this litigation until the Service becomes more conversant with the local law governing debtor-creditor relations. The subject cases have also focused attention on the problems which state and local governments must also face in this area. The result may well be the drafting of new legislation by the states which would have the effect of making the liability of a transferee more certain, except in those areas in which public policy dictates exemption.[15]

14. *Cf.* the result in *Floersch* v. *United States*, 171 F. Supp. 260 (N. Mex. 1959), now on appeal to the 10th Circuit.

15. See, *e.g.*, the New York Corporation Code provision referred to above in note 9. This statutory provision clearly spells out such liability on the part of a stockholder-transferee both to New York and the Federal Government.

Activities of Sections

SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW

Officers, Council members and Committee Chairmen of the Section of Insurance, Negligence and Compensation Law held a most fruitful and enjoyable series of meetings at The Homestead, Hot Springs, Virginia, October 25-29, 1959. Chairman John J. Wicker, Jr., of Richmond, Virginia, presided.

All Committee Chairmen made reports and plans for 1959-1960 were discussed with particular attention being given to the expanding areas of Section activity.

The Section participated actively in the recent Memphis Regional Meeting. It will participate also in the Portland, Oregon, Regional Meeting in May and the Houston, Texas, Regional Meeting in November. Outstanding programs will feature speakers of ability and national prominence. It is anticipated that the Section will cooperate with the Junior Bar Conference and the Section of Judicial Administration in the presentation of these programs.

Cooperation and close liaison with other Association Sections and Standing Committees will highlight this year's activities. Such cooperation is in keeping with the need for discussion and communication between Sections considering similar problems of interest to Association members.

Because this Section has always presented at Annual Meetings programs of wide appeal to Association members, Chairman Wicker requested Committee Chairmen to have specific recommendations for their Committee's part in the Annual Meeting. Accordingly, 1960 Committee Program Chairman Edmund D. Leonard, of San Francisco, has now completed the format of this program which promises to be of tremendous interest to Section and other Association members and to our distinguished British guests.

The Fire, Casualty, Workmen's Compensation and Employer's Liability, Accident and Health, and Automobile Committees are working on annotations of insurance policies within their area of responsibility. The hope is that such annotations will be published in 1960 and 1961. These annotations require a great amount of work and they are of substantial interest and use to the legal profession.

A new undertaking of the Section this year is the publication of a newsletter which will be sent periodically to the Section's more than 6,500 members. Editor is Carroll R. Heft, of Racine, Wisconsin. The newsletter, titled *News-O-Gram*, will contain material of immediate interest to Section members.

All meetings and social activities of the Section at Washington (August 29-September 1) will be at the Hotel Shoreham. Because of the location of this year's Annual Meeting, because of the visit by our British friends and because of the attractiveness of the Section's program, Chairman Wicker urges all Section members to make early registration with the Association for hotel accommodations.

SECTION OF PUBLIC UTILITY LAW

The Council of the Section of Public Utility Law met in Chicago on October 30, 1959, at which various committee reports were received.

Willard W. Gatchell, Chairman of the Administrative Law Committee, reported that his committee had been active in the area of pending legislation affecting practice before the administrative agencies. This committee is particularly interested in S. 600, S. 2374 and H.R. 6774, the latter two being generally known as the "American Bar Association agency ethics bills".

In addition to the above bills, S. 1070 has also been introduced, which is designed to recodify the Code of Administrative Procedure. While remedial legislation may be in order in these areas, it is important that these measures receive careful consideration in order to make sure that legislation designed to improve the administrative process does not result in crippling it. The Administrative Law Committee of the Section of Public Utility Law bears the heavy responsibility of reporting to the members of the Section with respect to this legislation.

Jerrold Seymann, Chairman of the Meetings and Entertainment Committee, reported that the annual dinner dance of the Section at the Washington meeting is to be held at the Terrace Ballroom of the Shoreham Hotel on Tuesday evening, August 30. Howard Lanin's orchestra will provide the music. Members of the Section who wish to attend this dinner dance should make sure to get their reservations in early. An announcement will be made in this column when tickets are available.

Stephen H. Fletcher, Chairman of the Program Committee, outlined tentative plans for a program which will assure the Section of very worthwhile meetings.

Horace P. Moulton was designated

as liaison member between the Section and the Antitrust Section, John B. Prizer as liaison member between the Section and the Joint Committee on Continuing Legal Education, and A. W. D. Gronningsater as liaison member between the Section and the Section of Taxation.

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

Several committees of the Section will utilize the occasion of the Midyear Meeting in Chicago to advance their current projects. Scheduled to meet during the period of that meeting are the committees on educational programs under the chairmanship of Bryce M. Fisher, of Cedar Rapids, on Corporate Law in Agriculture and Ranching, under the chairmanship of William O. Weaver, of Wapello, Iowa, and on Developments in Business Financing under the chairmanship of Robert C. Barker, of Chicago. The committee on corporate laws of which Leonard D. Adkins, of New York City, is chairman, will also meet at that time to complete the annotations of the Model Business Corporation Act for publication.

The second annual edition of the Directory of Section members has been printed and is being distributed to Section members. The Directory, which has been very helpful in Section work, contains a supplement listing the names of corporations and of Section members employed full-time in their corporate law departments or performing legal functions in lieu thereof. Every effort was made by questionnaire in June, 1959, and thereafter by supplemental inquiry in cases of uncertainty, to secure accurate information for the Supplement. All additions, corrections and changes in affiliation subsequent to the questionnaire should be sent to the Executive Secretary of the Section at the American Bar Center in Chicago so that the Directory may be made the best possible list of all Section members.

All of the Section lawyers will be interested in the January issue of *The Business Lawyer* for its many timely articles on current legal topics. One of the articles is a report of "A Financial Clinic for Lawyers", a panel discussion presented at the Memphis regional meeting by the Committee on Developments in Business Financing. As "Clinic" members, Larry Gilbertson, of Washington, D. C.; John Hawkinson, of Des Moines; Homer Kripke, of New York City; Edward Smith, of Atlanta, and Erwin R. Stuebner, of Chicago, discussed the subject of "Where To Look for Money". Ray Garrett, Jr., of Chicago, was moderator.

Among other articles are, "Legal Problems of Economic Power", by A. A. Berle, Jr., "The Travails of a Federal Law of Unfair Competition", by Philip J. O'Brien, Jr., "The Uniform Commercial Code: Review Assessment. Prospect—November, 1959", by Walter D. Malcolm, and "United States v. Bethlehem Steel Corporation—A Judicial Interpretation of Section 7", by Richard J. Flynn.

SECTION OF LABOR RELATIONS LAW

A splendid reception was accorded the Section's participation in the Southern Regional Meeting of the American Bar Association at Memphis, Tennessee, last November. More than 100 lawyers attended the Section's presentation held at the Hotel Peabody on November 12, 1959. For many of those present in all probability the expression "legislative intent" has taken on a new meaning because of the substitution of a new program geared to the Labor-Management Reporting and Disclosure Act of 1959 for the program originally planned for this meeting.

Kenneth C. McGuiness, of Washington, Former Assistant General Counsel of the National Labor Relations Board and Counsel for the minority group in the House of Representatives during consideration and passage of the Labor Reform Act, spoke on the legislative history of the Act. Boyd S. Leedom, Chairman of the National Labor Relations Board, discussed generally the Board's role in the interpretation of those provisions of the new act amending the National Labor Relations Act. A panel consisting of Frank A. Constangy, of Atlanta, Georgia, and L. N. D. Wells, Jr., of Dallas, Texas, moderated by Edwin Pearce, of Atlanta, Georgia, discussed the probable effect of the act on management and labor.

Newell N. Fowler and Anthony J. Sabella, of Memphis, Tennessee, members of the Regional Committee on Workshops and Sections, were aided in making arrangements for the Section presentation by Messrs. Constangy and Pearce. Section Chairman John W. Morgan presided at the meeting.

The next important event on the Section's calendar is the Midyear Meeting to be held at the Edgewater Beach Hotel, Chicago, Illinois, on Saturday and Sunday, February 20 and 21, 1960, beginning at 10:00 A.M. on Saturday. Among other matters to be discussed at this meeting will be the Section's participation in the Regional Meeting of the American Bar Association to be held at Portland, Oregon, on May 22-25, 1960. The Section has been invited to put on a program at this meeting. Messrs. Marion B. Plant, of San Francisco, California, and George E. Bodle, of Los Angeles, have been appointed by the Section Chairman to discuss with the Chairman of the local Portland Committee on Arrangements, plans for the Section's participation in the program. The program to be presented at Portland will be passed upon at the Midyear Council Meeting.

The Section Chairman, with the assistance of the Vice Chairman and the new Secretary, Professor Paul R. Hays, has made all committee appointments for the current year, and the membership of each Committee has been notified of the appointments. Even at this early date Section members may be assured that the reports which will be made to the Section at the Annual Meeting next August will arouse the enthusiastic interest of Section members planning to attend this noteworthy meeting, at which there will be present with us members of the English Bar.

Tracy Ferguson, of Syracuse, New York, a member of the Council, has taken over the assignment as liaison representative to other Sections. John Mulder, of Philadelphia, Director of the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, has already referred several matters concerning advanced legal education to Mr. Ferguson's attention.

OUR YOUNGER LAWYERS

Kenneth J. Burns, Jr., Chicago, Illinois, Secretary, Junior Bar Conference;
Elizabeth Elward, Washington, D.C., Editor;
Charlotte P. Murphy, Washington, D.C., Associate Editor

Midyear Meeting

The midyear meeting of the Junior Bar Conference will be held in conjunction with the American Bar Association's Midyear Meeting on February 20 and 21 at the Edgewater Beach Hotel, Chicago, Illinois. Activities will begin Saturday morning with a continental breakfast for Junior Bar members followed by an Executive Council meeting.

A luncheon Saturday will feature Ross L. Malone, immediate past President of the American Bar Association. Mr. Malone will discuss the practical aspects and workings of the Association. Egbert L. Haywood, of Durham, North Carolina, the member of the Board of Governors designated to work with the Junior Bar Conference this year, will meet with the Council Saturday to discuss the relationships between the various Sections and other groups which make up the Association. Kirk M. McAlpin, of Savannah, Georgia, J.B.C. chairman during 1958-59, currently Section Delegate to the House of Delegates, will also report Saturday afternoon on the current activities of the House of Delegates. Other items included on the agenda for the Executive Council will be the growing problem of traffic court congestion, the report of the recent National Conference on Judicial Selection and Court Administration, and reports on J.B.C. committee activities. Saturday's activities will close with a reception in the late afternoon. Guests at the reception, which will be sponsored by the Conference's Committee on Cooperation with Other Sections of the Association, will include the chairmen, or their representatives, of the other seventeen Sections. All members of the Conference in attendance are also invited. In order to foster increased J.B.C. member participation in the work of the other Sections, representatives from the other Sections have also been invited to attend the meetings of the Executive Council, and members of the J.B.C.'s committee will attend the meetings of other Sections with the hope of developing more effective liaison between the Conference and the other Sections. R. Harvey Chappell, of Richmond, Virginia, is in charge of this program.

Conference activity at the Midyear Meeting will conclude with an Executive Council meeting Sunday. There will be a program for wives of J.B.C. members attending the meeting.

Affiliation

William R. Cogar, of Richmond, Virginia, Chairman of the Affiliation Committee, reports that his group is planning to contact every organized, but unaffiliated, state or other junior bar unit in the country in an effort to persuade them to become a part of the J.B.C. family. By the Annual Meeting next August, Bill's committee hopes to better last year's record when thirteen additional junior bar groups were affiliated. Actually, these plans are already off to a fast start, for two state groups (New Jersey and Nebraska) and several local junior bar groups (including Macomb County, Michigan, and Charleston, South Carolina) will have their affiliation petitions acted on at the Executive Council meeting in February.

The committee, with its enlarged membership and additional vice chairmen, will also attempt to stimulate the organization of junior bar groups in areas where such groups are non-existent or now meet only informally.

Annual Meeting Plans

Robert T. Thompson, of Atlanta, Georgia, chairman of the J.B.C. committee involved, has announced that the Conference will again sponsor a reception at the 1960 Annual Meeting in Washington, D. C., for outgoing and incoming state and local junior bar presidents and their wives. This activity was initiated last August at Miami Beach and proved most successful. Former J.B.C. Chairmen and recent American Bar Association President Charles S. Rhyne, of Washington, D. C., the featured luncheon speaker at

Members of the Committee on the Status of the Young Lawyer in Government, discussing future activities (from left to right): Charles Ablard—Post Office; Lt. Comdr. Andrew J. Valentine—Navy; Committee Chairman Edwin S. Rockefeller—Federal Trade Commission; Ruth Wanamaker—Internal Revenue Service-Treasury; Donald K. Duvall—State Department; Seymour K. Hale—Civil Service Commission; Cosimo C. Abato—Labor Department; Robert Becker—Department of Health, Education and Welfare; Herbert I. Rothbart—Federal Trade Commission; and J. Gordon Cooney—Federal Trade Commission.

the 1959 event, added to the success of what will no doubt become a tradition at J.B.C. annual meetings.

Military Lawyers

J. Parker Connor, of Washington, D. C., Chairman of the Military Service Committee, reports that his group paid its traditional visit to the Army J.A.G. School at the University of Virginia on January 14. As in the past, they gave the military lawyers a lively rundown on the benefits of American Bar Association membership, with the result that about 90 per cent of the graduating class signed applications on the spot.

Legislative Committee Activities

With the 86th Congress barely convened for its second session, Edwin R. Schneider's Legislation Committee has had little opportunity to train its sights on the target areas for this year's efforts of the Conference. However, during the short but volatile 1960 session, the committee will move at a lively pace in tune with Capitol Hill activity. Among the subjects of J.B.C. interest are bills for compensation of appointed counsel in federal criminal cases, and the Smathers-Morton-Keogh-Simpson legislation. Other measures will be reviewed at the midyear meeting to determine if they should receive J.B.C. support.

Other Committee Activities

The midyear issue of *The Young Lawyer*, the official publication of the Conference, will be mailed to all J.B.C. members about February 1. It will include a résumé of committee activities thus far as well as plans for the balance of this year. Some of the highlights so far this year are: the efforts of the newly established Committees on Clients' Security Fund and World Peace Through Law, in co-operation with their Association counterparts; plans for the Young Attorney Government Placement Service under the direction of the Committee on the Status of Young Lawyers in Government; the plans of the Award of Achievement Committee for an even bigger and better awards competition between junior bar groups at the 1960 Annual Meeting; the increased size and number of *Junior Bar Bulletins* prepared by the Projects Committee to give information and assistance to junior bar groups; liaison with the Canadian Junior Bar to increase participation by young Canadian lawyers in the 1960 Annual Meeting; and the successful lectures at several law schools arranged by the Unauthorized Practice of Law Committee.

Law Student Activities

The finals in the traditional National Moot Court Competition for 1959, sponsored by the Younger Lawyers Committee of The Association of the Bar of the City of New York, were held in late December in that city with twenty-one teams competing. Nearly one hundred law school teams participated throughout the country in the opening rounds. The champion team (and winner of the John C. Knox silver cup) from Willamette University College of Law, and the runner-up from the University of Oklahoma College of Law, both acquitted themselves admirably. The Willamette team was judged as presenting the best oral argument, while the Columbia University School of Law team won the Harrison Tweed Bowl for the best brief. The defending champion was the University of Texas School of Law.

1960 J.B.C. Directory

The *1960 J.B.C. Directory* has recently been distributed to the official family to assist in Conference administration and as a source of current information about the Conference. Included are the names and addresses of committee personnel, of delegates to the Conference Assembly, and of other active members, as well as the official calendar of J.B.C. events, information for committee chairmen, and the current J.B.C. by-laws. Anyone interested may obtain copies as long as the supply lasts by contacting J.B.C. headquarters at the American Bar Center, Chicago 37, Illinois.

Conference on Economics of the Practice of Law Is Scheduled for February in Chicago

A conference on economics of law practice for committee chairmen and officers of state and local bar associations has been called for an all-day meeting on Friday, February 19, at the Edgewater Beach Hotel in Chicago. It will precede the Midwinter Meeting of the House of Delegates, the National Conference of Bar Presidents and the National Conference of Bar Secretaries.

The program, arranged by the Special Committee on Economics of Law Practice at the request of numerous state bar committees, will include presentations by authorities in the field from all parts of the United States. Chairmen of state and local bar committees on economics of law practice, and also the presidents and secretaries or other designated representatives of all associations are invited to attend. Hotel reservations should be obtained through the Reservations Department, American Bar Association, 1155 East 60th Street, Chicago 37, Illinois.

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That the Covenants are non-self-executing is made abundantly clear in Article 2 of each. The Covenant on Civil and Political Rights provides:

> Where not already provided for by existing legislative or other measures, each state undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of this Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in this Covenant.

The Covenant on Economic, Social and Cultural Rights provides:

> Each state party hereto undertakes to take steps, individually and through international cooperation, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in this Covenant by legislative as well as by other means.

It is difficult, therefore, to go along with the *Wall Street Journal*'s worry that treaties will supersede the Constitution—at least as far as *these* treaties are concerned.

A second feature of the Covenants seems to answer the *Wall Street Journal*'s fear that they would place in jeopardy the rights of U. S. citizens. Article 5(2) of each ensures that there would be no lessening of any existing rights in any state party to the Covenants. The provision in the Covenant on Civil and Political Rights is typical:

> There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any contracting state pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Yet, according to the *Wall Street Journal*, we have only two choices:

1. Continue to deny to the I. C. J. the right to interpret the Constitution of the United States "as it sees fit," or

2. Run the risk of permitting the "erosion" of the rights of our citizens.

The *Wall Street Journal* is mistaken. This is not the choice at all. Nor is the basic question of the Connally Reservation fairly stated. The court certainly has not seen fit to transcend its jurisdictional limits with respect to those nations which have not insisted on "sole judge of domestic jurisdiction" reservations. When the United States withdraws its Connally Reservation, the court will not inherit the power to throw some magic switch giving it a green light to impair, diminish or knock-out the rights of American citizens.

Let the rest of mankind come up to our standards, says the Wall Street Journal; *Let's not cut our rights and freedoms down to theirs!*

The instruments at hand are hardly suited to cutting our rights. To do this, we should need covenants and treaties requiring our country to descend to the level of existence which, unfortunately, handicaps the growth and development of too many millions of human beings the world over.

This, however, fortunately, the United Nations Charter, the Covenants on Human Rights and the International Court of Justice do not do—and do not propose to do.

We may assume, I hope, that "the people of this Republic" are concerned not only with the preservation of their own rights, but, in addition, are more anxious than the *Wall Street Journal* realizes about the rights, freedoms and opportunities of others.

As to the Connally Reservation, the Association's Committee urges the United States to remove its stifling barrier so that the World Court may better assist in the settlement of those disputes between nations amenable to judicial resolution. Here is an opportunity, as the Rhyne Committee suggests, to use our sovereignty to promote the rule of law, thus confirming by the action and example of the United States the words of our public men who often these days in their speeches plead for a "lasting peace with justice", and decry the lack of law and order in world affairs.

It is true that this would be a small, modest first step. But it is a step we could take with safety and confidence. And it is a step.

Now it is time for the Senate of the United States of America to take the step.

Legal Research Film Available

A documentary research film in full color entitled "Where Law and Practice Meet" has been shown, by invitation, during the past year at a number of bar association meetings, law schools and at other legal gatherings. It fits in with the program for continuing legal education that is being so ably carried on by many bar associations.

The film, which has received highly favorable comment, has its setting in the office of a typical general practitioner whose son has just been admitted to the Bar and has entered his father's law offices as a junior partner.

With a commendable avoidance of technicalities, the film sets out in a simple understandable way the basic sources for legal research as well as the most efficient and time-saving methods of finding what the lawyer is seeking, such as a case in point; a statute and its court constructions; a judicial definition or other authority.

The showing time is between thirty and forty minutes. The film was prepared under the supervision and direction of West Publishing Company to make it factual and practical and can be unqualifiedly recommended as a brief "refresher course" for both the veteran lawyer and the beginner.

Write to W. W. Marvin, West Publishing Company, 50 Kellogg Boulevard, St. Paul 2, Minnesota, for copies of the film.

(Continued from page 166)

Bar long after the cause disappeared. Lawyers were allowed to insult, bully and even victimize hostile witnesses to such a degree that men about to be cross examined actually trembled with fear. One eventuation of this was the practice of interchanging acrimonies between counsel. Smith and Mason, for example, engaged in frequent contests degenerating into personality aspersions of caustic severity. As Joel Parker, one-time Chief Justice of New Hampshire and later professor of law in Harvard, politely expressed it, the Rockingham County Bar during this period inculcated in its members "great fidelity to the interests of the client, rather than great courtesy towards the opposing counsel".

This practice partly explains why most lawyers were unsuccessful in trying cases against Mason, Webster, Smith, Bartlett, Sullivan and Plumer,—they couldn't stand the bullying. But this by no means tells the whole story. To appreciate how great these men really were we need only note some of the lesser members of the Rockingham County Bar. An example is Levi Woodbury. He began his public career, at twenty-six, as the youngest judge ever to sit on a New Hampshire court, and then went on to be Governor, Senator, Secretary of the Navy, Secretary of the Treasury, and after declining the ambassadorship to the Court of Saint James became the only New Hampshire lawyer appointed to the United States Supreme Court. He might have been the only New Hampshire President, too, but for his untimely death. As it was Franklin Pierce received the honor, partly because he had been Woodbury's student.

Another example is Richard Fletcher. One evening while serving as principal of the academy in Salisbury, the home town of Webster and Bartlett, he took a walk, and as he was ascending a hill his gaze turned westward and he noticed a young man approaching out of the blazing red of the mountain twilight. "It was the most majestic figure and noblest countenance on which I have ever gazed", he later recalled. "It seemed almost like an angel standing in the sun." Fletcher followed Webster to Portsmouth and became a student in his office. While practicing among the giants at the Rockingham County Bar he made little headway. Only after he moved to Boston was he able to establish his reputation, becoming a congressman and arguing many famous actions before the Supreme Court, the most memorable of which was the Charles River Bridge Case.

A third unique lawyer who practiced in the shadow of the giants was Samuel Bell, the founder of the Bell dynasty which produced three governors, two United States Senators, and one Chief Justice for New Hampshire. He himself served as an Associate Justice on the Superior Court, as Governor, and finally as the only Whig Senator to sit in the upper house from Daniel Webster's home state.

It might be said there were four tiers of lawyers who practiced at the old Rockingham County Bar. At the bottom were the average, run-of-the-mill attorneys. Some, like Congressman Nathaniel A. Haven, enjoyed national political reputations, but at home were mere pygmies among giants when they attempted to practice their profession and often had to seek other means of livelihood, as Haven did when he established a Portsmouth newspaper. A little higher were Woodbury, Fletcher and Bell, men who might have been leaders of any other Bar. Next were Sullivan, Bartlett and Plumer, exceptional lawyers by any standard. And finally the giants, Webster, Mason and Smith. Even so loyal a son as William Plumer, Jr., did not suggest his father belonged in their class, admitting him "unequal in mere law learning to Smith, with less acuteness of metaphysical discriminations than Mason, and yielding, as all others have done, to the massive intellect of Webster".

Some may quarrel with the notion of placing two forgotten country lawyers in the same category as Webster, but he himself put them there. He considered Smith the most brilliant man he had ever met except for Fisher Ames. And he wrote Chancellor Kent that Smith knew everything there was to know about New England "and as to the law, he knows so much more than I do, or ever shall, that I forbear to speak on that point". He had an even greater reverence for Jeremiah Mason. He once said that if you were to ask him who was the greatest lawyer he had ever known, and pressed him hard, he would reply John Marshall, but if you took him by the throat and shoved him up against the wall he would have to admit it was Jeremiah Mason. This was no mean compliment from a man who had studied under Gore, argued before Marshall, Story and Shaw, and against Pinkney, Wirt, Holmes, Dexter and Ames. This was no home town boy speaking with the patronizing nostalgia of one who had made good. This was the measured verdict of a lawyer who excelled as a judge of lawyers.

The people of Rockingham County appreciated these men and were envious of neighbors drawn for jury duty. In one term they might enjoy the glory of Sullivan's oratory; admire the learning of Woodbury or Bell; be entertained by the daring of Smith's sallies and smile at the sting of Bartlett's repartees; be engrossed by Mason's overpowering logic; marvel at the clear, precise brevity of Plumer's graceful summations; and wither under the sarcasm of Webster's voluminous voice, the glow of his cavernous eyes, and the curl of his scornful lips.

To compare these men is only to note their individual strengths: Bartlett the great counselor, Sullivan the great orator, Webster the great advocate, Mason the great lawyer, and Smith the great student of law. They were all students in their special fields. Webster the politician was a student of men, while Plumer the disciple of Bentham and Jefferson was a student of government. Smith the jurist and legal philosopher was a student of jurisprudence, while Mason the master of special pleading was a student of nomology. It is unnecessary to compare these men individually—to compare Smith, the more lucid expositor, to Mason, the stronger reasoner with his masterly powers of analysis; to compare the grandiloquent style of Sullivan to the penetrating common sense of Bartlett. It is sufficient merely to note that they excelled in the now lost art of advocacy in an era when advocacy was one of the highest callings a man could follow.

The Giants' Final Clash —the Dartmouth College Case

Yet, oddly enough, the greatest trial in which these men participated in that old, dusty Exeter courtroom was not at *nisi prius* but was an appellate argument before the law term of the Superior Court. It was the *Dartmouth College* case, one of the most important litigations in the entire history of American constitutional law. They all played a part. Plumer, who was Governor, set the stage for the final clash of giants when he asked the legislature to revoke the old charter of Dartmouth and grant a new one bringing the previously private corporation under state control. "The college", he said, "was formed for the public good, not for the benefit or emolument of its trustees; the right to amend and improve acts of incorporation of this nature has been exercised by all governments, both monarchical and republican." He sent a copy of the message to his friend Jefferson who called it *truly republican*. "The idea", he wrote Plumer, "that institutions, established for the use of the nation, cannot be touched nor modified, even to make them answer their end, because of rights gratuitously supposed in those employed to manage them in trust for the public, may, perhaps, be a salutary provision against the abuses of a monarch, but it is most absurd against the nation itself. Yet our lawyers and priests generally inculcate this doctrine; and suppose that preceding generations held the earth more freely than we do; had a right to impose laws on us, unalterable by ourselves; and that we, in like manner, can make laws and impose burdens on future generations, which they will have no right to alter; in fine, that the earth belongs to the dead, and not to the living."

The trustees of the college saw things more simply than Jefferson. When the legislators revoked their old charter and created Dartmouth University, vesting it with ownership of the College assets, they insisted it wasn't an exercise of legitimate governmental powers but arbitrary seizure of private property and brought an action of trover against the new trustees. Thus the issue was clearly drawn between the principles of Jeffersonian democracy and the principles of Hamiltonian liberty. The matter to be settled in that Exeter courtroom was which of the two philosophies contending for supremacy in early America would be accepted as the theory behind New Hampshire constitutional law.

Mason, Smith and Webster were counsel for the College, Sullivan and Bartlett for the University. Presiding was Chief Justice Richardson, a former Massachusetts congressman who had practiced law in Portsmouth for only two years before being elevated to the Bench. Physically he was often compared to Marshall, for his eyes, like Marshall's, were dark, piercing and brilliant, and his hair "was black as a raven's wing". His two associates were Woodbury and Bell. All three were appointed by Plumer who had removed the old Federalist court over which Jeremiah Smith had presided. His opponents claimed he had done so principally to insure a favorable result in this case.

The glorious epoch of the Rockingham County Bar reached its apex that September of 1817 when these eight men gathered in Exeter to try the *Dartmouth College* case. The ebb would be rapid, and in a few years only Sullivan and Bartlett would be left in the once mighty arena of the giants. Smith was fifty-eight, Mason fifty, Bell forty-seven, Richardson forty-four, Sullivan forty-three, Webster thirty-five, Bartlett thirty-one, and Woodbury a mere twenty-eight. Smith was about to retire to his beloved books. Webster had already moved to Boston. Mason would soon follow him. In two years Bell would be Governor, and, in 1823, when he became Senator, Woodbury succeeded him.

The case was argued along the Jeffersonian-Hamiltonian lines which Plumer had drawn. Mason, a graduate of Yale, and Smith, a graduate of Rutgers, left the final plea to Webster, who, in what is called the "Caesar in the Senate" peroration of his argument, begged Bell and Woodbury, as alumni of the College, to forbear the fatal blow which, Brutus-like, would come so near to the heart of their *alma mater*.[1]

The jurists were unmoved. Chief Justice Richardson wrote an opinion which closely parallels Jefferson's letter to Plumer. He held that the College was a public corporation subject to the control of the legislature and that even if the charter were a contract the government had power to modify it at its discretion. "All public interests", he wrote, "are proper subjects of the legislature; and it is peculiarly the province of the legislature to determine by what laws those interests shall be regulated."

Although Webster admitted to Story that Richardson's opinion was "able, ingenious, and plausible", he was not discouraged. He appealed the case to the Supreme Court in Washington, presided over by John Marshall, a man far more receptive to the Hamiltonian principles of private property than were the Republican judges whom Plumer had appointed. Marshall reversed Richardson's decision, holding that the revocation of the College charter was a violation of the contract clause of the United States Constitution. After Rufus Choate's famous eulogy of Webster at Dartmouth in 1853, it became a New Hampshire legend that the great Chief Justice, who had never gazed on the green hills surrounding Hanover, was moved to tears by Webster's concluding plea "It is, sir, as I have said, a small college,— and yet there are those who love it . . ." Woodbury and Bell would have smiled, had they lived to hear that story.

It was a great victory for Webster, perhaps the greatest victory he ever achieved in a court of law. It extended his reputation as a lawyer far beyond the confines of provincial Exeter. In the years of triumph which followed he never forgot the debt he owed to the Rockingham County Bar which had trained him in the tradition of the giants. Long after he had died men were still being trained in that tradition. Daniel Christie, of Dover, the most successful office teacher of law in

1. Historians disagree whether Woodbury, who was a trustee of the new University, took part in the decision. The docket reads, "Jus. Woodbury, doth not sit", but the official report (1 N. H. 111) makes no mention of him not participating. Contemporary sources, however, indicate he was present on the Bench and thus Webster undoubtedly addressed his plea at him as well as at Bell. See note #1, 65 N. H. 624.

New Hampshire history, used to have his students study the courtroom tactics and professional conduct of Webster and his Rockingham County colleagues. It must have been a remarkable tutelage for he counted among his students Chief Justice Ira Perley of whom Rufus Choate said that no man in New England knew more law; John Parker Hale, one of America's finest advocates and first free-soil Senator; Jeremiah Smith, Jr., who followed his father onto the state Supreme Court and was later professor of law in Harvard; and Charles Doe, the greatest judicial reformer the common law has ever known.

The men who had argued at the Rockingham County Bar were but legends to the boys who were trained in small town offices like Christie's, yet their strengths and weaknesses were as closely studied as if they were still arguing in the old courtroom at Exeter. The contemptuous power of Mason, the withering scorn of Webster, the flashing anger of Sullivan came to life in a hundred imaginations. Their courthouse has long since been torn down but, if today you enter the oak-stained room that replaced it you will see their portraits on the walls. Their presence has created a hallowed atmosphere which a century of silence cannot dispel. Many have gone to worship in that temple. William Plumer, Jr., was one. To him they were Grecian heroes. He saw his father, Governor Plumer, as the Nestor or Ulysses of the group, Judge Smith as the Menelaus "with a touch of the Thersites humor", Mason as the Ajax or Agamemnon, "towering head and shoulders above the rest", and Webster as the Achilles, *impiger, iracundus, inexorabilis, acer.* "To strangers, such language may seem extravagant", he reflected. "Perhaps it is so. But one who witnessed, always with admiration, sometimes with awe and reverence, the encounters of these extraordinary men, cannot speak of them in language appropriate to the ordinary routine of practice in an obscure country court."

Their influence upon future generations may be partly judged by the fact that New Hampshire attorneys never ceased to study them and that among the papers Charles Doe was carrying at the time of his death was an old brief in Mason's handwriting and a picture of Jeremiah Smith. The lesson which these men learned from the giants of the Rockingham County Bar was that great advocates win cases not by emulating their rivals, but by developing their own strong points: Smith, his greater knowledge of the law; Webster, his greater intellect; Mason, his greater understanding of human nature. If they wished they might copy the graceful actions of Bartlett or the industry and systematic arrangement of Woodbury. But who could hope to imitate Sullivan the charmer and the orator? Or the elaborate learning and quaint humor of Smith? Or Mason with his original mind and proud superiority? Who could hope to emulate Webster, the most ambitious and successful?

The epitaph of the Rockingham County Bar was written by Plumer: "It, indeed, often witnessed the strife of Titans; weak men did not mingle in it; strong men felt the need of all their strength."

Judicial Reform

(Continued from page 162)

He can take real interest in this "a-making" process of which Mr. Wilson spoke.

He can keep close to his profession and familiarize himself with its responsibilities for today and the future.

If he has the traditional lawyers' attitude of suspicion, indifference and skepticism as to attempts to improve justice he can at least realize that such attempts have acquired a new and far more vital significance than ever before which may require a reappraisal of his ideas.

He can study methods proposed to remedy important defects of the system like delay, selection of judges by political leaders, legislative control of procedure and the like.

He can realize that the day has come when we can no longer with safety play the "hands off", "too busy" role which so many of us have played for so long.

For these purposes he can devote at least an hour a month to reading the publications of the American Bar Association and of the American Judicature Society (address of both: 1155 East Sixtieth Street, Chicago), and those of his local bar associations and so know of the opportunities for service that are open to him.

Judges who taunt their associates who dispose of cases in conferences, instead of by trial, as "glorified adjusters"; and lawyers and judges who scoff at pretrial and avoid use of it as much as possible may well consider the significance of the decline in the use of the trial process in the disposition of civil cases in recent years.

Yes, Judge Vanderbilt was right. The highway of judicial reform is no place for the short-winded.

It seems never to have a terminus, never to be straight, always full of ruts, always to involve steep grades and rough going. Traveling it seems a discouraging business—and futile. It seems a waste of effort.

But it is not.

So we come back to his question: "To whom shall we turn for help?"

Perhaps the answer is, "to ourselves".

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tions in different cases as to the meaning of a provision of the Administrative Procedure Act, for example, would obviously weaken the effectiveness of the Government's presentation. Similar questions of procedure and evidence and even constitutional law may arise in cases under different statutes handled by different parts of the Government. And it would be improper for the Government to take a position on the law in order to win a particular case when it was taking a different position in other cases. A General Counsel of an important agency, who believes that on the whole the agency should not be subject to as much control by the Solicitor General as is exercised, says:

> ...it is, in my opinion, plainly necessary that there be some centralized control over both substantive and technical issues the agencies of Government desire to take to the Supreme Court. Without coordination of the efforts of the Government's many arms, departments and agencies, I feel that the Court might well be faced with conflicting or even diametrically opposed views of different branches of Government on specific questions, which would be intolerable.

The fact that in a very small number of cases, such as I have mentioned, agencies publicly take opposing positions does not mean that coordination is not generally beneficial.

Even when there is no possibility of conflict or disagreement, the knowledge which the Solicitor General's Office has gained in cases on behalf of one part of the Government may be extremely helpful in representing another part. The existence of one group of lawyers to some extent familiar with Government litigation generally and with the work of all agencies is particularly important in the field of administrative law.

The thought will doubtless occur to you that such coordination should exist before cases get to the Supreme Court. That sounds very simple and sensible. The difficulty is that the volume of Government litigation in the lower courts is so vast that no person could possibly become familiar with much of it. There aren't enough hours in the day, or perhaps enough cells in the brain. Lawyers who work steadily at tax law or antitrust law, or for the ICC, the SEC or the Labor Board just aren't able to—and don't—keep up with Government cases in other fields.

Apart from that, to require clearance of all cases through one central group of lawyers would create a bottleneck which would tend to delay everybody. The bottlenecks in the various divisions of the Department of Justice resulting from the need for clearance of their business through the Assistant Attorney General—and to some extent in the Solicitor General's Office with respect to appeals to the Courts of Appeals—are often bad enough, and they operate on a much smaller scale. These difficulties and delays require giving the attorney handling a case in the lower courts considerable freedom from review in Washington, and certainly from review of all Government litigation in a single office. Even at the cost of an occasional confession of error in the Supreme Court, it is better to wait until coordination is practicable, as it is at the Supreme Court level, before attempting it.

I do not mean to suggest that the Solicitor General and his staff are the only attorneys in the Government who are extremely competent, objective or familiar with Supreme Court standards. We all know that this is true of many other lawyers in the Department of Justice and in the agencies, and particularly of those in the appellate sections with which the Solicitor General most often deals. This is the reason there is so little discord in the system.

The attorneys who deal frequently with the Solicitor General's Office usually try to apply Solicitor General's standards in their own bailiwicks. I suspect that they get away with this in part because the agency's recommendations must eventually secure the Solicitor General's approval.

The question may be asked whether the Solicitor General's authority over the Supreme Court litigation of the agencies does not impinge upon their independence. Such bodies as the ICC, the FTC, the SEC and the Labor Board were meant to be free from Executive control. They are often described as legislative agencies carrying out the policy of Congress, and the President is not supposed to control their decisions or to dismiss their members except for exceptionally good cause.

To subject the Supreme Court litigation of such agencies to the authority of an official who is not only under the President but also subordinate to the Attorney General and now the Deputy Attorney General seems inconsistent with the theory that the agency is not subject to Executive or political controls. For an agency's policies can be frustrated if it is prevented from defending its position in the Supreme Court.

Despite this possibility, in the over twenty years in which I have been familiar with the Solicitor General's Office, both from the inside and the outside, I have never heard it criticized on the ground that it was acting as a political arm of the Administration. On the contrary, an attorney in one of the other Departments has aptly characterized it as probably more objective and free from political influences than any other office or agency in the Government.

Disagreements between the Solicitor General's Office and agency counsel are usually attributable to differences of opinion on questions of law, on whether the Supreme Court's standards for review have been satisfied, or on how the Supreme Court is likely to react to an issue.

To what extent do the Solicitor General's opinions as to policy, as distinct from politics, enter into his decisions in reviewing agency recommendations? Some agency representatives believe that since Congress committed questions of policy to the agency, the Solicitor General has no business substituting his own judgement on such matters.

The Solicitor General recognizes that it is the agencies' function to determine how the statutory policies should be carried out. But in determining close questions of statutory interpretation, it is often difficult to disentangle a person's view as to what is sensible or right from his opinion as to how the law should be construed. And what one person will reasonably regard as a decision based on law, another will reasonably believe to have been based on policy, as must be clear to anyone

who reads what Supreme Court Justices say about each other in majority and dissenting opinions. In my opinion, the Solicitor General seldom does substitute his opinion for that of the agencies on anything which would be describable as a clear-cut matter of policy. But I cannot say that he never does—although he would do so only in what he thought was a very clear case.

Despite the self-restraint which most Solicitors General exercise in their treatment of agency recommendations, the answer must be that when the Solicitor General has the last word on Supreme Court matters, the freedom of the agency is to some extent curtailed. The extent of this is lessened by the fact that in some cases of disagreement, the Solicitor General authorizes agencies to appear for themselves.

When an agency is permitted by law or by the Solicitor General to represent itself, the Solicitor General's failure to join with it in signing the brief indicates to the Court that he is not in accord with its position. Although not quite the kiss of death—agencies sometimes win in these circumstances—this kind of handicap certainly does not help them. But as long as the agency can take its case to the Court and state its position, its independence has not been impaired.

Have the effects of this control by the Solicitor General been good or bad? Should he have the complete authority he now exercises over many agencies, or none at all, or should both the Solicitor General and the agency be permitted to appear independently, as in the case of the ICC?

My judgment as to this can hardly be unbiased. When I was in the Solicitor General's Office, the Solicitor General's decisions, strangely enough, seemed very reasonable—to me.

Since I could not trust my own objectivity, I sought the views of distinguished lawyers who are or have been counsel for independent agencies. Almost all agree that the Solicitor General's Office improves the quality of the agencies' briefing, that its objectivity and broader perspective are generally helpful, and that some coordination in the handling of Supreme Court litigation is desirable.

But a number of them feel that the agencies should be free from the Solicitor General's control. At least two have recently recommended to Congress that this control be removed. In particular, they do not think that he should have the last word on whether the agencies can petition for certiorari or appeal. The recent report of the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, H. R. 2711, 85th Cong., 2d Sess., January 3, 1959, page 10, contains the following recommendation:

> Each commission should be allowed, as a matter of right, to participate and be represented in judicial proceedings involving the statute and regulations which it administers.

One agency counsel suggests that the Solicitor General should not override an agency's recommendation except when it is necessary to achieve harmony and consistency in the presentation of Government cases. Another urges that the Solicitor General may overrule an agency's recommendation for what may be called legal reasons, but not because of policy or philosophical considerations, a line which is not easy to draw. And some think he should not have power to override the agencies at all.

A number of persons from whom I heard stated, on the other hand, that although they may have disagreed with the Solicitor General's judgment in particular cases, the system as a whole has been beneficial, because of the quality of the lawmanship in the Solicitor General's Office and the advantage of unified control by attorneys with a broader viewpoint. They stress the great weight which the Solicitor General has always given to the agencies' recommendations, and on the whole feel that the present practice works well. And this was the view of most of the persons who in the past have been both counsel for the agencies and members of the Solicitor General's staff.

As you may probably have gathered, this would be my own opinion, for what it is worth. On the other hand, I can see the agencies' side of the case, which is both logical and quite sensible from their point of view. I don't believe that the world, even the judicial world, would come to an end if other agencies were given the freedom which the ICC now possesses, or even more—though I suspect that the Supreme Court would not like it, and that the agencies would benefit extremely rarely by winning more cases than they do now.

The ultimate question is not whether the Solicitor General is invariably right when he overrules agency recommendations. Of course, he is not. Even the Supreme Court has been said to make mistakes. The point is whether, since the final decision must be made somewhere, the advantages of having it come from an institution with the tradition, standards and competence of the Solicitor General's Office outweigh any impingement upon the independence of the agencies. And the public interest in the effective operation of the Supreme Court, as well as the public interest in having the Government win cases, must be counted in the balance.

Even though the Solicitor General's authority is inconsistent with the theory of agency autonomy, in practice it has, I think, been helpful, not harmful, to the public and the Government as a whole, including the agencies. And that should continue to be true so long as the Office operates with the combination of competence and self-restraint which it has shown in the past.

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The Senate's Democratic majority did not want to see the Court "packed" with Whigs. On a strictly partisan basis they "postponed" action on Crittenden so that the Democratic President-elect, Andrew Jackson, would be able to make an appointment after he took office in March.

WILLIAM SMITH: nominated by President Jackson on March 2, 1837, and confirmed by the Senate five days later. Smith, a strong Democratic partisan, declined, candidly stating that he intended to remain in active politics.

JOHN CANFIELD SPENCER: nominated by President Tyler, rejected by the Senate by a vote of 21:26. The opposition to Spencer was strictly political and was directed against both the candidate and the appointing President. Spencer was "personally obnoxious" to the Clay Whigs and was considered by them to be a "turncoat" because of his support of Tyler. The fight against confirmation was led by Clay, Webster and Crittenden.

RUBEN HYDE WALWORTH: nominated by President Tyler on March 13, 1844, action on Walworth was "postponed" by the Senate by a vote of 27:20 three months later. Senatorial courtesy played a role in this case, Walworth being opposed by both senators from his home state of New York. More important, however, Walworth, like Spencer, was "personally obnoxious" to the Clay Whigs because of his support of President Tyler. Confident that Clay would be elected President the following November, the Senate "postponed" action on Walworth to enable Clay to make an appointment (presumably of Senator Crittenden whose own appointment by Adams had been "postponed" in the same manner fifteen years earlier). Unfortunately for Clay and Crittenden, Polk defeated Clay in the ensuing election.

EDWARD KING: nominated by Tyler on June 5, 1844, action was "postponed" by a vote of 29:18 ten days later. As in the case of Walworth, the Senate decided to wait for Clay's election so that Clay could make the appointment. In December, Tyler sent King's name to the Senate again. However, the Senate, still at odds with the President, refused to confirm King and "postponed" action again. There would be no confirmation of Tyler appointments by this Senate majority. (An exception was made in the case of Mr. Justice Nelson who was confirmed at this time. However, Nelson's personal prestige was great and all factions agreed that his nomination was "preeminently a wise one".)

JOHN MEREDITH READ: Tyler insisted on acting the part of President of the United States. When King was "postponed", he nominated Read who, unfortunately, was a man of limited legal ability. This fact certainly did not help the nomination. In any event, the Senate had no intention of confirming Tyler's appointment, despite the election of Polk, and adjourned without acting on the nomination.

GEORGE WASHINGTON WOODWARD: nominated by President Polk on December 23, 1845, rejected by the Senate one month later by a vote of 20:29. Woodward had made some enemies within his party because of his "native American sentiments". He was not very well known, and senatorial courtesy undoubtedly helped to bring about his rejection when Senator Cameron of his home state of Pennsylvania made it clear that Woodward was "personally objectionable" to him.

EDWARD A. BRADFORD: the Senate refused to act on President Fillmore's nomination and adjourned to await the election of a Democratic President without voting on Bradford.

GEORGE EDMUND BADGER: the Democratic Senate refused to confirm a Whig appointment even though Badger was an incumbent Senator and was well qualified for the office. Preferring to wait for the inauguration of President-elect Pierce, the Senate "postponed" this Fillmore nomination by a vote of 26:25.

WILLIAM C. MICOU: Fillmore tried again, but the Senate adjourned without acting on the Whig nomination, thus leaving the office to be filled by the incoming Democratic President Pierce.

JEREMIAH SULLIVAN BLACK: nominated by President Buchanan, Black was rejected by a vote of 25:26. Black was bitterly opposed by Senator Stephen Douglas, of Illinois. The anti-slavery elements also opposed Black because as U. S. Attorney General he had given an official opinion that the President had no power to prevent a state from seceding. Most important, the Republicans in the Senate wanted to wait one month for the inauguration of President-elect Lincoln so that the new President could make an appointment.

HENRY STANBERRY: nominated by President Johnson in 1866. The Senate, rather than confirm a Johnson appointment (despite the fact that Stanberry

was a Republican and highly respected), passed a bill reducing the number of justices on the Supreme Court from ten to seven. To hit at the despised President, the Senate thus eliminated the office, preventing Johnson from making any appointments.

EBENEZER ROCKWOOD HOAR: nominated by President Grant on December 15, 1869, Hoar was rejected by the Senate seven weeks later by a vote of 24:33. A multitude of factors were involved in the rejection of Hoar, all political. Many Senators did not like the recommendations Hoar had made as Attorney General to the President with regard to the appointment of nine circuit court judges. Others did not like his support of civil service reform. Still others objected to his opposition to the impeachment of President Johnson. And there were few who liked his independence.

EDWIN MCMASTERS STANTON: nominated by Grant to conciliate the Hoar appointment. Stanton was very popular and his appointment was recommended by a petition signed by a majority of the House of Representatives and of the Senate, a truly unique event in U. S. history. Nominated and confirmed by a vote of 46:11 on December 20, 1869, Stanton died four days later. He never sat on the Court.

GEORGE HENRY WILLIAMS: nominated by President Grant, his nomination was withdrawn five weeks later when it became apparent that Williams was strongly opposed by various bar associations. His talents as a lawyer were mediocre, he had lost several important cases, and the Bar did not believe him to be qualified for the office.

CALEB CUSHING: nominated by President Grant (after the Williams furor) on January 9, 1874, his nomination was withdrawn by the President five days later. While his age (74) was used against him, the major reason for the opposition to Cushing was the nominee's political instability. He had been, in turn, a Whig, a Tyler Whig, a Democrat, a Johnson Constitutional Conservative, and a Republican. (Shades of the Vicar of Bray!) No one really knew what his political position was, and he was thus opposed by almost all political factions.

ROSCOE CONKLING: nominated by President Arthur on February 24, 1882, and confirmed by the Senate one week later, Conkling is the last man to decline after senatorial approval. While he cited his inexperience, it is apparent that Senator Conkling, at 53, did not wish to leave the political arena. He clearly harbored ambitions.

WILLIAM BUTLER HORNBLOWER and WHEELER HAZARD PECKHAM: Hornblower was nominated by President Cleveland and rejected four months later by a vote of 24:30. This is a classic example of senatorial courtesy in operation, since the rejection was caused by the opposition of Senator Hill of Hornblower's home state of New York. Upon the rejection of Hornblower, Cleveland sent up the name of Peckham, also a New Yorker. However, Hill's opposition also resulted in Peckham's rejection, this time by a vote of 32:41.

JOHN J. PARKER: nominated by President Hoover on March 21, 1930, Parker is the last man to date to have been rejected by the Senate (by the very close vote of 39:41). Parker was opposed by labor groups because, as a judge, he had handed down an opinion upholding the legality of "yellow-dog" contracts. He was also opposed by Negro groups because he had allegedly made anti-Negro remarks in his campaign for Governor of North Carolina ten years previously. In addition, Parker was opposed by Progressive Republicans because they thought that his economic views were too conservative.

An analysis of the factors involved in the rejection or declination of appointees supplements the information derived from "unusual delays". The death of Edwin McMasters Stanton four days after his nomination and confirmation does not, of course, affect our data. However, it is interesting to note the unique feature of the appointment of Stanton. This is the only time that a President nominated a man as the result of a petition signed by a majority of both Houses of Congress.

Six men were appointed and confirmed but never served because they declined to accept their commissions. The two major reasons for declination were:

1. *Age and health considerations.* William Cushing (1796) and Lincoln (1811). Lincoln was nominated by President Madison against his wishes in an attempt to "draft" him for the job.

2. *Political considerations.* Jay (1800), J. Q. Adams (1811), Smith (1837) and Conkling (1882). Each of these men believed that an active political career would be more rewarding than a seat on the high bench. Jay, a former Chief Justice of the United States, made it clear that he thought that the Court was governmentally insignificant. It is interesting to note that, other than Conkling, no one appointed after 1837 declined. Except for Lincoln, we do not know whether any of the earlier appointees were consulted by the President before their appointments were made. At any rate, the appointing procedure then evidently was somewhat casual, and the office valued but little in comparison with others that gave promise of more power. In the case of Conkling, it is evident that he desired to remain in active politics, but it is not clear whether or not he was appointed without his consent.

In sixteen cases the nominee was either rejected outright, "postponed", or no action was taken by the Senate. In one case, the nominee's office was

abolished and in two others the President was forced, by opposition, to withdraw the names. All of these may be termed "rejections". While in many rejections more than one factor was present, we found five major factors for rejection:

1. *Opposition to the appointing President,* manifesting itself in opposition to his nominee. There were five Presidents who were affected in this manner. J. Q. Adams' nominee (Crittenden) was postponed to enable the new President, Jackson, to make an appointment. Two of Tyler's appointees (Spencer and King) were rejected and two (Walworth and Read) were postponed because of the Senate's opposition to the President. One of Fillmore's nominees (Badger) was postponed and no action was taken on two (Bradford and Micou) because the Senate wanted to enable the new President to make appointments. Buchanan's nominee (Black) was rejected for the same reason, and the seat of Johnson's appointee (Stanberry) was abolished by Congress because of the bitter opposition to the President. In many of these cases, the opposition to the appointee also had important political connotations in that major policy issues were involved and these issues were connected with the opposition to the President. It was not, of course, always blind hatred to the President which brought about the rejections. In this area, American politics has matured—at least to the extent that no man has been rejected for a seat on the Supreme Court because of opposition to the appointing President since 1866.

2. *Involvement with a political issue* on which there is strong feeling on the part of the public, some senators, or pressure groups. Thus, John Rutledge was rejected because of his opposition to the Jay Treaty. Wolcott was rejected by the opponents of the embargo and non-intercourse acts. Similarly, Woodward was rejected because of his "native American sentiments" and J. S. Black was opposed by anti-slavery elements. Hoar invoked political opposition on at least three grounds: his advice to Grant on the appointment of circuit court judges, his support of civil service reform, and his opposition to the impeachment of Johnson. Finally, Parker was rejected by the combined influence of labor unions, Negro groups, and Progressive Republicans.

3. *Senatorial courtesy.* Senatorial courtesy appears to have been the only factor involved in the rejection of Hornblower and Peckham and it was one of the factors in the cases of Walworth and Woodward.

4. *Limited ability of the nominee.* Williams' nomination was withdrawn because of the disapprobation of the Bar which considered his talents to be, at best, mediocre. Wolcott's rejection was due, in part, to the lack of support on the part of his fellow Republicans who considered him to be a man of very limited ability.

5. *Political unreliability of the nominee.* Caleb Cushing's nomination was withdrawn because of opposition to his appointment generated by his chameleon-like political affiliations.

III. "Unlucky" Presidents

Some Presidents were "unlucky" when their Supreme Court appointments came before the Senate. Tyler, perhaps, was the most conspicuous in this category. Only one of his appointees ever reached the Court. Two of his men were rejected and two were "postponed".

Fillmore was almost equally unsuccessful. Like Tyler, only one of his appointees ever sat on the Court. One of his nominees was "postponed" and the Senate refused to act on two others.

Johnson never made a successful appointment because his one chance was taken away from him when Congress abolished the office.

But it is Grant whose record is generally conceded to be the poorest.

While four of his candidates finally sat on the Court, two of them were compelled to wait an unusually long time for confirmation. In addition, Grant was forced by opposition to withdraw the names of two nominees, and one of his men was rejected by the Senate. To top off this record, Grant's most popular appointment, that of Stanton, failed when the newly named Justice died four days after his confirmation.

Finally, Cleveland also had a great deal of difficulty. Four of his appointees became Justices of the Supreme Court, but two of them had to wait an unusually long time for confirmation. In addition, two of his nominees were rejected through the operation of senatorial courtesy.

IV. *Conclusions*

Except for Conkling's declination in 1882, no man who was nominated and confirmed as a Supreme Court Justice has refused to accept the office since 1837. Age and health and political considerations were the two major reasons for declinations. Early political considerations included the fact that other offices, such as governor of a state, chief justice of a state court, and U. S. Senator or Representative were deemed to be "more important" positions than that of Justice of the United States Supreme Court. The appointment procedure was evidently more casual in the early days of the country, for today, if a nomination is made, the President knows that the man will accept if confirmed. This indicates that the office is held in higher esteem, as well as the fact that communications are vastly improved. Of course, we have no way of knowing how many men decline presidential offers of appointment to the Supreme Court or their reasons for doing so, but speculation would indicate that there are not many who would turn down the post if offered to them.

During the first half of the country's independence, a substantial number of appointments to the Supreme Court were rejected or delayed on the basis of opposition to the President, rather than opposition to the candidate. Frequently, the Senate decided to wait until after an election or until the inauguration of a new President before it would act. It even went so far as to reject two of Tyler's appointments despite the fact that the Whigs, under Clay, had lost the election of 1844. It might be construed as a sign of increased political maturity to note that no man has been rejected because of opposition to the appointing President since Stanberry in 1866.

Senatorial courtesy or personal senatorial vendettas or both have been major factors in the confirmation procedure. While some candidates have been rejected on this basis, often the Senator can do no more than delay confirmation for a period of time. While certainly important, these factors are not as potent as is commonly supposed.

Generally speaking, opposition to nominees does not seem to be based on the qualifications or lack thereof of the men appointed. Perhaps the nominee's personal shortcomings play a bigger role when the appointee is not confirmed, but even here such a generalization is difficult to make because when opposition is personal or political or both, an attempt is made to place the opposition on more "respectable" grounds.

Although the name of Charles Evans Hughes (on his appointment as Chief Justice) does not appear on the list of "unusual delays", the struggle in his case was fought with great bitterness—although within a fairly brief period—and almost caused him to withdraw. Brandeis was the man most fiercely opposed for his personal qualities or the deficiencies which his opponents thought they perceived in him. Here too, however, the overt opposition emphasized more "respectable" reasons.

In general, opposition to the confirmation of a Supreme Court Justice seems to reflect the existence of deep-seated concern in the nation. It thus became more frequent and noticeable as the influence of the Court became more apparent. In the early years of the Court's history relatively little concern was shown about the potentially "unfortunate effects" of justices of uncertain, or certain, convictions. At the present time, when there are so many issues on which large numbers of people are deeply disturbed, almost every appointee is made to run the gauntlet; he may even feel slighted if his appointment is unopposed, since this could be interpreted as a sign that he is not regarded as a man who carries very much weight. The appointment and confirmation procedure has become one more battleground on which large issues are fought out before the public eye.

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in the balance. It is the responsibility of the judge to weigh carefully in the scales of justice such considerations.

Other penalties have been imposed by courts upon youthful offenders which are effective in persuading them that traffic laws should be obeyed. I have in mind the penalty that has been imposed by traffic judges in Berkeley, upon such offenders by requiring them to perform some useful service for the benefit of the community. In this manner both the offender and the community profit.

In the determination of penalties it is necessary frequently to require probation reports and when such occasions arise thorough reports should be prepared and submitted to the court.

In addition to the customary duties of a judge, the traffic judge also occupies the unique position, if he would instill in the public respect and confidence in our system of administering justice, of assuming responsibility for court administration and public relations. Space will permit me to discuss these responsibilities only briefly, but their importance cannot be overemphasized.

The Judge's Responsibility for Administration

At the outset let me say the ideal system would provide for a court administrator as advocated by the American Bar Association Traffic Court Program Committee, which would relieve hard-working traffic judges and create greater uniformity and efficiency in the traffic court program. But until the ideal is achieved, judges must assume a good measure of all responsibility for administration.

Just as public dissatisfaction with the administration of justice may be created by disparity of treatment of offenders by one judge, adverse criticism is aroused by dissimilarity in procedure within a particular area, state, or even interstate. The need for

uniformity in traffic procedure, and insofar as possible without infringing upon any individual judge's discretion and judgment in the imposition of penalties, seems apparent. The American Bar Association Traffic Court Program Committee, by pointing out the evils that result from lack of uniform traffic procedure and proposing standards for remedying such evils, has inspired substantial progress in the proper direction. It advocates strongly the adoption of the uniform vehicle code and model traffic ordinance prepared and published by the National Committee on Uniform Traffic Laws and Ordinances, an arm of the White House Conference on Highway Safety and its predecessor, the President's Highway Safety Conference, the model rules governing procedure in traffic cases drafted and approved in 1957 by the National Commissioners on Uniform State Laws, and the use of the uniform traffic ticket and complaint. About the use of the uniform code Chief Justice Vanderbilt said ". . . . it is a problem that imperatively deserves presentation to our high officals and to leaders of public opinion as part of a program of saving life and limb and property and of increasing respect for law".

Problems of administration exist in every traffic court. Uniformity of laws and procedure would simplify the problems. In any event, traffic judges, in the absence of a court administrator, must interest themselves in the proper solution of such problems.

Even though uniformity of procedure may be impossible of accomplishment by judges, in some jurisdictions because of absence of legislative action and others because of lack of integration by courts with power to promulgate such rules, the meeting of judges in conferences sponsored by state bar associations and other groups results in improvement through the exchange of ideas and the educational process.

Local authorities in charge must be

educated to the fact that dignity and decorum are required if justice is to be properly administered in a traffic court. This demands adequate courtroom facilities, clerical equipment, competent and courteous personnel and accurate records.

The presence of traffic court prosecutors in all traffic sessions is essential for maintenance of proper standards. For the first time in history a public defender was appointed in the traffic court. This precedent was set in the Municipal Traffic Court of the City of Chicago several months ago.

Perhaps the traffic judge should not be charged with the sole responsibility for accomplishment of all of the abovementioned matters but his familiarity with the subject mentioned may convince him of the desirability of exercising his influence in the improvements suggested and they may be realized through his efforts.

The Judge's Responsibility for Public Relations

The traffic judge has a tremendous responsibility to impress upon the public that justice in traffic courts is being administered in an equitable manner. It has been reiterated over and over again that traffic court justice will be effective in a direct ratio with public confidence engendered by the court.

It is an essential, of course, to inspire such confidence that each defendant be apprised of his rights and be given an opportunity to express himself in response to any testimony of a police officer or other evidence offered by the prosecution. In brief, he should be assured of the protection of his constitutional rights. This requires the judge to inform the defendants who

appear before him of their rights. Some courts distribute among the defendants, before their appearance, literature informing them of their rights and the court procedure.

The judge must always bear in mind that the great majority of defendants obtain their first impression of a court of justice by their appearance in the traffic court and that generally the defendant takes no appeal. Whether or not the defendant departs from the traffic court with a favorable or unfavorable opinion of American justice depends upon the traffic judge.

Insofar as possible a defendant must not leave the courtroom believing that the prosecution has received favored treatment or that he was not given the opportunity to fairly present his case. Traffic judges, particularly in large communities, are exceedingly busy but it is their responsibility to see that each defendant gets a fair trial.

Without public support even a conscientious judge may fail in his efforts to administer justice fairly and efficiently. I don't think a traffic judge lives who has not experienced the sly conduct of an attempted tag-fixer or pressure of one group or another or the pleading of a well-intentioned friend for favored treatment. The difficult job of a traffic judge will be much easier if he has the proper public support.

Traffic judges should be aware of the fact that the winning of public approval is not an easy task.

Allow me to make a few practical suggestions:

(1) The traffic judge should assume a place of leadership in the community in matters involving traffic safety by attendance at all traffic meetings, joining in the efforts of the local chapter of the National Safety Council, local bar associations and other civic organizations to improve traffic conditions. When opportunity affords he should accept invitations to speak on the subject.

(2) He should attend traffic violators' schools occasionally, address those present and lend his support whenever needed.

(3) He should discuss the subject of traffic with community leaders, citizens, safety organizations, official agencies, newspaper publishers and editors and other interested persons, with a view to fixing public attention on the urgency of supporting a public traffic safety program, and on the court in its effort to properly enforce traffic laws.

(4) He should encourage visits by students and other groups to his courtroom during sessions and address them. He should implement the "Go to traffic court as a visitor, not as a violator" program of the American Bar Association.

(5) Newspapers are interested in publishing traffic news of consequence. Statistics involving the disposition of cases is a matter of community interest and will receive attention if properly presented. This was accomplished with some measure of success in San Francisco by the submission of monthly reports when I was the traffic judge. Radio and television stations also may be encouraged to disseminate such information.

(6) It may interest you to know that in San Francisco last May, with the assistance of a great many organizations in the city, a traffic safety conference and exhibition was held in the auditorium of a public school under the sponsorship of the Citizens Traffic Safety Committee, the San Francisco Chapter of the National Safety Council, California Traffic Safety Foundation, American Bar Association's Traffic Court Program. Funds contributed by the afore-mentioned organizations and the Standard Oil Company of California made possible the staging of the conference.

Conferences like this one and others such as the one-day traffic court and enforcement conference held at the University of California in Santa Barbara last October, under the sponsorship of the California Traffic Safety Foundation and the University Extension, bring to the public an awareness of the importance of traffic safety.

There are many other things I could mention which could be adopted in an energetic traffic judges' program but time does not permit. I recommend for reading the eighteen steps in local improvements listed by James P. Economos in his fine article entitled, "The Traffic Problem, Traffic Laws, and Traffic Courts".[1]

In summary let me state briefly that traffic judges are in a position to prove that George Washington was right when he said that "The administration of justice is the firmest pillar of government." Traffic court judges are responsible for the proper operation of the most populous courts in our land. They and their counterparts currently face millions of persons annually. They help shape the dominant civic habits and attitudes in our society. They are in a position to provide the public with education on a subject affecting materially the everyday existence of themselves and their friends. They have the power through their treatment of defendants, and their judgment and discretion, to fix penalties that may cause respect or disrespect for our system of justice. I suggest in determining punishment that you recall the verses from Gilbert and Sullivan's *The Mikado* (Act II):

My object all sublime
I shall achieve in time—
To let the punishment fit the crime...

The reduction of deaths this past year, despite the growth in population and the great increase in the number of motor vehicles, indicates substantial improvement and hope for the future.

1. Available in small quantities without charge from the Traffic Court Program Committee, American Bar Center, Chicago, Illinois.

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Spring Meeting, Washington, D. C.	May 15-17, 1960

Midyear Meeting

Edgewater Beach Hotel, Chicago, Illinois	February 18-23, 1960
Administration Committee	February 18, 1960
Board of Governors	February 18-20, 1960
Group Meetings	February 20-21, 1960
House of Delegates	February 22-23, 1960

Regional Meetings

Portland, Oregon	May 22-25, 1960
Houston, Texas	November 9-12, 1960